No. 9916

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM JACKSON SHAW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

MORRIS LAVINE,
619 Bartlett Building, Los Angeles,
Attorney for Appellant.

FILED

PAUL P. O'BRIEN,
CLERK

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Title I

SECURITIES ACT OF 1933 as amended[1]

Title II

CORPORATION OF FOREIGN BONDHOLDERS ACT, 1933

[PUBLIC—No. 22—73D CONGRESS]

[H.R. 5480]

AN ACT

To provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I

SHORT TITLE

SECTION 1. This title may be cited as the "Securities Act of 1933".

DEFINITIONS

SEC. 2. When used in this title, unless the context otherwise requires—

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for,

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[1] The matter appearing in **bold-face** type with footnote, references represents subsections and subparagraphs *as amended.* The footnotes contain the text prior to amendment. Bold-faced type without footnote references indicates *provisions added* by amendment. The amendments, except, as otherwise noted, became effective July 1, 1934, and are contained in Title II of Securities Exchange Act of 1934, Public, No. 291, 73d Congress, approved June 6, 1934.

259500°—41——1

guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.[2]

(2) The term "person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust, any unincorporated organization, or a government or political subdivision thereof. As used in this paragraph the term "trust" shall include only a trust where the interest or interests of the beneficiary or beneficiaries are evidenced by a security.

(3) The term "sale", "sell", "offer to sell", or "offer for sale" shall include every contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value; except that such terms shall not include preliminary negotiations or agreements between an issuer and any underwriter. Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been sold for value. The issue or transfer of a right or privilege, when originally issued or transferred with a security, giving the holder of such security the right to convert such security into another security of the same issuer or of another person, or giving a right to subscribe to another security of the same issuer or of another person, which right cannot be exercised until some future date, shall not be deemed to be a sale of such other security; but the issue or transfer of such other security upon the exercise of such right of conversion or subscription shall be deemed a sale of such other security.

(4) The term "issuer" means every person who issues or proposes to issue any security; except that with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; except that in the case of an unincorporated association which provides by its articles for limited liability of any or all of its members, or in the case of a trust, committee, or other legal entity, the trustees or members thereof shall not be individually liable as issuers of any security issued by the association, trust, committee, or other legal entity; except that with respect to equipment-trust certificates or like securities, the term "issuer" means the person by whom the equipment or property is or is to be used; and except that with respect to fractional undivided interests in oil, gas, or other mineral rights, the term "issuer" means the owner of any such right or of any interest in such

[2] "(1) The term 'security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of interest in property, tangible or intangible, or, in general, any instrument commonly known as a security, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing."

right (whether whole or fractional) who creates fractional interests therein for the purpose of public offering.[3]

(5) The term "Commission" means the Federal Trade Commission.[4]

(6) The term "Territory" means Alaska, Hawaii, Puerto Rico, the Philippine Islands, Canal Zone, the Virgin Islands, and the insular possessions of the United States.

(7) The term "interstate commerce" means trade or commerce in securities or any transportation or communication relating thereto among the several States or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia.

(8) The term "registration statement" means the statement provided for in section 6, and includes any amendment thereto and any report, document, or memorandum accompanying such statement or incorporated therein by reference.

(9) The term "write" or "written" shall include printed, lithographed, or any means of graphic communication.

(10) The term "prospectus" means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio, which offers any security for sale; except that (a) a communication shall not be deemed a prospectus if it is proved that prior to or at the same time with such communication a written prospectus meeting the requirements of Section 10 was sent or given to the person to whom the communication was made, by the person making such communication or his principal, and (b) a notice, circular, advertisement, letter, or communication in respect of a security shall not be deemed to be a prospectus if it states from whom a written prospectus meeting the requirements of Section 10 may be obtained and, in addition, does no more than identify the security, state the price thereof, and state by whom orders will be executed.[5]

(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or par-

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[3] "(4) The term 'issuer' means every person who issues or proposes to issue any security or who guarantees a security either as to principal or income; except that with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted management, or unit type, the term 'issuer' means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; and, except that with respect to equipment-trust certificates or like securities, the term 'issuer' means the person by whom the equipment or property is or is to be used."

[4] See Secs. 27 and 28, infra, being Sections 210 and 211, Title II of Securities Exchange Act of 1934, providing for transfer to "Securities and Exchange Commission" of all powers, duties, and functions of the Federal Trade Commission.

[5] "(10) The term 'prospectus' means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio, which offers any security for sale; except that (a) a communication shall not be deemed a prospectus if it is proved that prior to such communication a written prospectus meeting the requirements of section 10 was received, by the person to whom the communication was made, from the person making such communication or his principal, and (b) a notice, circular, advertisement, letter, or communication in respect of a security shall not be deemed to be a prospectus if it states from whom a written prospectus meeting the requirements of section 10 may be obtained and, in addition, does no more than identify the security, state the price thereof, and state by whom orders will be executed."

ticipates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

(12) The term "dealer" means any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.

EXEMPTED SECURITIES

Sec. 3. (a) Except as hereinafter expressly provided, the provisions of this title shall not apply to any of the following classes of securities:

(1) Any security which, prior to or within sixty days after the enactment of this title, has been sold or disposed of by the issuer or bona fide offered to the public, but this exemption shall not apply to any new offering of any such security by an issuer or underwriter subsequent to such sixty days;

(2) Any security issued or guaranteed by the United States or any Territory thereof, or by the District of Columbia, or by any State of the United States, or by any political subdivision of a State or Territory, or by any public instrumentality of one or more States or Territories, or by any person controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States, or any certificate of deposit for any of the foregoing, or any security issued or guaranteed by any national bank, or by any banking institution organized under the laws of any State or Territory or the District of Columbia, the business of which is substantially confined to banking and is supervised by the State or Territorial banking commission or similar official; or any security issued by or representing an interest in or a direct obligation of a Federal Reserve Bank; [6]

[Note: See Appendix, I–F, p. 37, re additional exemption for securities issued under mortgage indenture insured under National Housing Act.]

(3) Any note, draft, bill of exchange, or bankers' acceptance which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which has a maturity at the time of issuance of not exceeding nine months,

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[6] "(2) Any security issued or guaranteed by the United States or any Territory thereof, or by the District of Columbia, or by any State of the United States, or by any political subdivision of a State or Territory, or by any public instrumentality of one or more States or Territories exercising an essential governmental function, or by any corporation created and controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States, or by any national bank, or by any banking institution organized under the laws of any State or Territory, the business of which is substantially confined to banking and is supervised by the State or territorial banking commission or similar official; or any security issued by or representing an interest in or a direct obligation of a Federal reserve bank;"

exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited;

(4) Any security issued by a person[7] organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit, and no part of the net earnings of which inures to the benefit of any person, private stockholder, or individual;

(5) Any security issued by a building and loan association, homestead association, savings and loan association, or similar institution, substantially all the business of which is confined to the making of loans to members (but the foregoing exemption shall not apply with respect to any such security where the issuer takes from the total amount paid or deposited by the purchaser, by way of any fee, cash value or other device whatsoever, either upon termination of the investment at maturity or before maturity, an aggregate amount in excess of 3 per centum of the face value of such security), or any security issued by a farmers' cooperative association as defined in paragraphs (12), (13), and (14) of section 103 of the Revenue Act of 1932;

(6) Any security issued by a common **or contract** carrier, the issuance of which is subject to the provisions of section 20a of the Interstate Commerce Act, as amended;[8]

> [Note: See Appendix, I–E, p. 35, for relevant provisions of Interstate Commerce Commisison and Motor Carrier Acts.]

(7) Certificates issued by a receiver or by a trustee in bankruptcy, with the approval of the court;

(8) Any insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like functions, of any State or Territory of the United States or the District of Columbia;

> [Note: See Appendix, I–G, p. 37, for limitation on this section with respect to investment companies.]

(9) Any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange;

(10) Any security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or by any official or agency of the United States, or by any State or Territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval;[9]

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[7] "Corporation."

[8] The words in **bold-face** are an amendment to Section 3 (a) (6) of the Securities Act of 1933, as provided in Section 214 of the "Motor Carrier Act of 1935", approved August 9, 1935.

[9] The first clause of the following former Sec. 4 (3) has been replaced by Sec. 3 (a) (9) and the second clause by Sec. 3 (a) (10) : "(3) The issuance of a security of a person ex-

[NOTE: See Appendix, I–A, B, C, and D, pp. 31–34, for additional exemptions provided by the Bankruptcy Act.]

(11) Any security which is a part of an issue sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within, or, if a corporation, incorporated by and doing business within, such State or Territory.[10]

[NOTE: See Appendix, I–G, p. 37, for limitation of this section with respect to investment companies.]

(b) The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, add any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this title with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds $100,000.

EXEMPTED TRANSACTIONS

SEC. 4. The provisions of section 5 shall not apply to any of the following transactions:

(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not involving any public offering; or transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except transactions within one year after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter (excluding in the computation of such year any time during which a stop order issued under section 8 is in effect as to the security), and except transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.[11]

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changed by it with its existing security holders exclusively, where no commission or other remuneration is paid or given directly or indirectly in connection with such exchange; or the issuance of securities to the existing security holders or other existing creditors of a corporation in the process of a bona fide reorganization of such corporation under the supervision of any court, either in exchange for the securities of such security holders or claims of such creditors or partly for cash and partly in exchange for the securities or claims of such security holders or creditors.'

[10] The following former Sec. 5 (c) has been supplanted by Sec. 3 (a) (11): "(c) The provisions of this section relating to the use of the mails shall not apply to the sale of any security where the issue of which it is a part is sold only to persons resident within a single State or Territory, where the issuer of such securities is a person resident and doing business within, or, if a corporation, incorporated by and doing business within, such State or Territory."

[11] "(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not with or through an underwriter and not involving any public offering; or transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except transactions within one year after the last date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter (excluding in the computation of such year any time during which a stop order issued under section 8 is in effect as to the security), and except transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter."

(2) Brokers' transactions, executed upon customers' orders on any exchange or in the open or counter market, but not the solicitation of such orders.

PROHIBITIONS RELATING TO INTERSTATE COMMERCE AND THE MAILS

SEC. 5. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security registered under this title, unless such prospectus meets the requirements of section 10; or

(2) to carry or to cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of section 10.

REGISTRATION OF SECURITIES AND SIGNING OF REGISTRATION STATEMENT

SEC. 6. (a) Any security may be registered with the Commission under the terms and conditions hereinafter provided, by filing a registration statement in triplicate, at least one of which shall be signed by each issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions (or, if there is no board of directors or persons performing similar functions, by the majority of the persons or board having the power of management of the issuer), and in case the issuer is a foreign or Territorial person by its duly authorized representative in the United States; except that when such registration statement relates to a security issued by a foreign government, or political subdivision thereof, it need be signed only by the underwriter of such security. Signatures of all such persons when written on the said registration statements shall be presumed to have been so written by authority of the person whose signature is so affixed and the burden of proof, in the event such authority shall be denied, shall be upon the party denying the same. The affixing of any signature without the authority of the purported signer shall constitute a violation of this title. A registration statement shall be deemed effective only as to the securities specified therein as proposed to be offered.

(b) At the time of filing a registration statement the applicant shall pay to the Commission a fee of one one-hundredth of 1 per

centum of the maximum aggregate price at which such securities are proposed to be offered, but in no case shall fee be less than $25.

(c) The filing with the Commission of a registration statement, or of an amendment to a registration statement, shall be deemed to have taken place upon the receipt thereof, but the filing of a registration statement shall not be deemed to have taken place unless it is accompanied by a United States postal money order or a certified bank check or cash for the amount of the fee required under subsection (b).

(d) The information contained in or filed with any registration statement shall be made available to the public under such regulations as the Commission may prescribe, and copies thereof, photostatic or otherwise, shall be furnished to every applicant at such reasonable charge as the Commission may prescribe.

(e) No registration statement may be filed within the first forty days following the enactment of this Act.

INFORMATION REQUIRED IN REGISTRATION STATEMENT

SEC. 7. The registration statement, when relating to a security other than a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule A,[12] and when relating to a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule B; except that the Commission may by rules or regulations provide that any such information or document need not be included in respect of any class of issuers or securities if it finds that the requirement of such information or document is inapplicable to such class and that disclosure fully adequate for the protection of investors is otherwise required to be included within the registration statement. If any accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, is named as having prepared or certified any part of the registration statement, or is named as having prepared or certified a report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement. If any such person is named as having prepared or certified a report or valuation (other than a public official document or statement) which is used in connection with the registration statement, but is not named as having prepared or certified such report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement unless the Commission dispenses with such filing as impracticable or as involving undue hardship on the person filing the registration statement. Any such registration statement shall contain such other information, and be accompanied by such other documents, as the Commission may by rules or regulations

[12] Section 24 (a) of the Investment Company Act of 1940 provides that an investment company registered under that Act may submit copies of the documents which it is required to file under that title in lieu of the registration statement specified in Schedule A of the Securities Act of 1933. [The text of this section is set forth in full in the Appendix, II–C, p. 40.]

require as being necessary or appropriate in the public interest or for the protection of investors.

[Note: See Appendix, II–A, p. 38, for requirements relating to securities issued under an indenture; see Appendix, II–B, 1–4, pp. 38–39, for situations in which alternate materials may be filed or incorporation by reference is permitted; see Appendix, II–B, 5, p. 39, for extent of obligation to file supplementary information.]

TAKING EFFECT OF REGISTRATION STATEMENTS AND AMENDMENTS THERETO

Sec. 8. (a) Except as hereinafter provided, the effective date of a registration statement shall be the twentieth day after the filing thereof or such earlier date as the Commission may determine, having due regard to the adequacy of the information respecting the issuer theretofore available to the public, to the facility with which the nature of the securities to be registered, their relationship to the capital structure of the issuer and the rights of holders thereof can be understood, and to the public interest and the protection of investors. If any amendment to any such statement is filed prior to the effective date of such statement, the registration statement shall be deemed to have been filed when such amendment was filed; except that an amendment filed with the consent of the Commission, prior to the effective date of the registration statement, or filed pursuant to an order of the Commission, shall be treated as a part of the registration statement.[13]

(b) If it appears to the Commission that a registration statement is on its face incomplete or inaccurate in any material respect, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice not later than ten days after the filing of the registration statement, and opportunity for hearing (at a time fixed by the Commission) within ten days after such notice by personal service or the sending of such telegraphic notice, issue an order prior to the effective date of registration refusing to permit such statement to become effective until it has been amended in accordance with such order. When such statement has been amended in accordance with such order the Commission shall so declare and the registration shall become effective at the time provided in subsection (a) or upon the date of such declaration, whichever date is the later.

(c) An amendment filed after the effective date of the registration statement, if such amendment, upon its face, appears to the Commission not to be incomplete or inaccurate in any material respect,

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[13] This is an amendment approved August 22, 1940, as Title III of Public, No. 768, 76th Cong., An Act "To provide for the registration and regulation of investment companies and investment advisers ________." It supplants the former Sec. 8 (a) which read:

"The effective date of a registration statement shall be the twentieth day after the filing thereof, except as hereinafter provided, and except that in case of securities of any foreign public authority, which has continued the full service of its obligations in the United States, the proceeds of which are to be devoted to the refunding of obligations payable in the United States, the registration statement shall become effective seven days after the filing thereof. If any amendment to any such statement is filed prior to the effective date of such statement, the registration statement shall be deemed to have been filed when such amendment was filed except that an amendment filed with the consent of the Commission prior to the effective date of the registration statement, or filed pursuant to an order of the Commission, shall be treated as a part of the registration statement."

259500°—41——2

shall become effective on such date as the Commission may determine, having due regard to the public interest and the protection of investors.

(d) If it appears to the Commission at any time that the registration statement includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice, and after opportunity for hearing (at a time fixed by the Commission) within fifteen days after such notice by personal service or the sending of such telegraphic notice, issue a stop order suspending the effectiveness of the registration statement. When such statement has been amended in accordance with such stop order the Commission shall so declare and thereupon the stop order shall cease to be effective.

> [NOTE: See Appendix, II–D, p. 40, for additional basis of stop order re investment companies; as to consolidation of proceedings with those under Trust Indenture Act see Appendix, II–E, p. 41.]

(e) The Commission is hereby empowered to make an examination in any case in order to determine whether a stop order should issue under subsection (d). In making such examination the Commission or any officer or officers designated by it shall have access to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine, the issuer, underwriter, or any other person, in respect of any matter relevant to the examination, and may, in its discretion, require the production of a balance sheet exhibiting the assets and liabilities of the issuer, or its income statement, or both, to be certified to by a public or certified accountant approved by the Commission. If the issuer or underwriter shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of a stop order.

(f) Any notice required under this section shall be sent to or served on the issuer, or, in case of a foreign government or political subdivision thereof, to or on the underwriter, or, in the case of a foreign or Territorial person, to or on its duly authorized representative in the United States named in the registration statement, properly directed in each case of telegraphic notice to the address given in such statement.

COURT REVIEW OF ORDERS

SEC. 9. (a) Any person aggrieved by an order of the Commission may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the Court of Appeals of the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or be set aside in whole or in part. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained

of was entered. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendations, if any, for the modification or setting aside of the original order. The jurisdiction of the court shall be exclusive and its judgment and decree, affirming, modifying, or setting aside, in whole or in part, any order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

INFORMATION REQUIRED IN PROSPECTUS

SEC. 10. (a) A prospectus—

(1) when relating to a security other than a security issued by a foreign government or political subdivision thereof, shall contain the same statements made in the registration statement, but it need not include the documents referred to in paragraphs (28) to (32), inclusive, of Schedule A;

(2) when relating to a security issued by a foreign government or political subdivision thereof shall contain the same statements made in the registration statement, but it need not include the documents referred to in paragraphs (13) and (14) of Schedule B.

(b) Notwithstanding the provisions of subsection (a)—

(1) When a prospectus is used more than thirteen months after the effective date of the registration statement, the information in the statements contained therein shall be as of a date not more than twelve months prior to such use, so far as such information is known to the user of such prospectus or can be furnished by such user without unreasonable effort or expense.[14]

(2) there may be omitted from any prospectus any of the statements required under such subsection (a) which the Commission may by rules or regulations designate as not being neces-

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[14] "(1) when a prospectus is used more than thirteen months after the effective date of the registration statement, the information in the statements contained therein shall be as of a date not more than twelve months prior to such use."

sary or appropriate in the public interest or for the protection of investors.

(3) any prospectus shall contain such other information as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

(4) in the exercise of its powers under paragraphs (2) and (3) of this subsection, the Commission shall have authority to classify prospectuses according to the nature and circumstances of their use, and, by rules and regulations and subject to such terms and conditions as it shall specify therein, to prescribe as to each class the form and contents which it may find appropriate to such use and consistent with the public interest and the protection of investors.

(c) The statements or information required to be included in a prospectus by or under authority of subsection (a) or (b), when written, shall be placed in a conspicuous part of the prospectus in type as large as that used generally in the body of the prospectus.

(d) In any case where a prospectus consists of a radio broadcast, copies thereof shall be filed with the Commission under such rules and regulations as it shall prescribe. The Commission may by rules and regulations require the filing with it of forms and prospectuses used in connection with the sale of securities registered under this title.

[NOTE: For additional powers of the Commission as to prospectuses of certain investment trust securities see Appendix, II-D, p. 40.]

CIVIL LIABILITIES ON ACCOUNT OF FALSE REGISTRATION STATEMENT

SEC. 11. (a) In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in, the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Notwithstanding the provisions of subsection (a) no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or cease or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1), and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and **(C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a**

report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.[15]

(c) In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.[16]

(d) If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) The suit authorized under subsection (a) may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less

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[15] "(C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, and that such part of the registration statement fairly represented the statement of the expert or was a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true, and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, and that such part of the registration statement fairly represented the statement made by the official person or was a fair copy of or extract from the public official document."

[16] "(c) In determining for the purpose ot paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a person occupying a fiduciary relationship."

than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: Provided, that if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this title the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.[17]

(f) All or any one or more of the persons specified in subsection (a) shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(g) In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

CIVIL LIABILITIES ARISING IN CONNECTION WITH PROSPECTUSES AND COMMUNICATIONS

SEC. 12. Any person who—

(1) sells a security in violation of section 5, or

(2) sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements in the light of the circumstances under which they were made, not mislead-

[17] "(e) The suit authorized under subsection (a) may be either (1) to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or (2) for damages if the person suing no longer owns the security."

ing (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission

shall be liable to the person purchasing such security from him, who, may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

LIMITATION OF ACTIONS

Sec. 13. No action shall be maintained to enforce any liability created under section 11 or section 12 (2) unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 12 (1), unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 11 or section 12 (1) more than three years after the security was bona fide offered to the public, or under section 12 (2) more than three years after the sale.[18]

CONTRARY STIPULATIONS VOID

Sec. 14. Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void.

LIABILITY OF CONTROLLING PERSONS

Sec. 15. Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under section 11 or 12, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, **unless the controlling person had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.**

ADDITIONAL REMEDIES

Sec. 16. The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity.

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[18] "Sec. 13. No action shall be maintained to enforce any liability created under section 11 or section 12 (2) unless brought within two years after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 12 (1), unless brought within two years after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 11 or section 12 (1) more than ten years after the security was bona fide offered to the public."

FRAUDULENT INTERSTATE TRANSACTIONS

SEC. 17. (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 3 shall not apply to the provisions of this section.

STATE CONTROL OF SECURITIES

SEC. 18. Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person.

SPECIAL POWERS OF COMMISSION

SEC. 19. (a) The Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this title, including rules and regulations governing registration statements and prospectuses for various classes of securities and issuers, and defining accounting, technical, and trade terms used in this title. Among other things, the Commission shall have authority, for the purposes of this title, to prescribe the form or forms in which required information shall be set forth, the items or details to be shown in the balance sheet and earning statement, and the methods to be followed in the preparation of accounts, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of consolidated balance sheets

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or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer; but insofar as they relate to any common carrier subject to the provisions of section 20 of the Interstate Commerce Act, as amended, the rules and regulations of the Commission with respect to accounts shall not be inconsistent with the requirements imposed by the Interstate Commerce Commission under authority of such section 20. The rules and regulations of the Commission shall be effective upon publication in the manner which the Commission shall prescribe. No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

(b) For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this title, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing.

INJUNCTIONS AND PROSECUTION OF OFFENSES

Sec. 20. (a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

(b) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States, United States court of any Territory, or the Supreme Court of the District of Columbia to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this title. Any such criminal proceeding may be brought either in the district wherein the transmittal of the prospectus or security complained of begins, or in the district wherein such prospectus or security is received.

(c) Upon application of the Commission the district courts of the United States, the United States courts of any Territory, and the Supreme Court of the District of Columbia, shall also have juris-

diction to issue writs of mandamus commanding any person to comply with the provisions of this title or any order of the Commission made in pursuance thereof.

HEARINGS BY COMMISSION

Sec. 21. All hearings shall be public and may be held before the Commission or an officer or officers of the Commission designated by it, and appropriate records thereof shall be kept.

JURISDICTION OF OFFENSES AND SUITS

Sec. 22. (a) The district courts of the United States, the United States courts of any Territory, and the Supreme Court of the District of Columbia shall have jurisdiction of offenses and violations under this title and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this title. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 225 and 347). No case arising under this title and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts.

(b) In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(c) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause, or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

UNLAWFUL REPRESENTATIONS

Sec. 23. Neither the fact that the registration statement for a security has been filed or is in effect nor the fact that a stop order is not in effect with respect thereto shall be deemed a finding by the Commission that the registration statement is true and accurate on its face or that it does not contain an untrue statement of fact or omit to state a material fact, or be held to mean that the Commission has in any way passed upon the merits of, or given approval to, such security. It shall be unlawful to make, or cause to be made, to any prospective purchaser any representation contrary to the foregoing provisions of this section.

PENALTIES

Sec. 24. Any person who willfully violates any of the provisions of this title, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this title, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

JURISDICTION OF OTHER GOVERNMENT AGENCIES OVER SECURITIES

Sec. 25. Nothing in this title shall relieve any person from submitting to the respective supervisory units of the Government of the United States information, reports, or other documents that are now or may hereafter be required by any provision of law.

SEPARABILITY OF PROVISIONS

Sec. 26. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Sec. 27. Upon the expiration of sixty days after the date upon which a majority of the members of the Securities and Exchange Commission appointed under Section 4 of Title I of this act have qualified and taken office, all powers, duties and functions of the Federal Trade Commission under the Securities Act of 1933 shall be transferred to such Commission, together with all property, books, records and unexpended balances of appropriations used by or available to the Federal Trade Commission for carrying out its functions under the Securities Act of 1933. All proceedings, hearings or investigations commenced or pending before the Federal Trade Commission arising under the Securities Act of 1933 shall be continued by the Securities and Exchange Commission. All orders, rules and regulations which have been issued by the Federal Trade Commission under the Securities Act of 1933 and which are in effect shall continue in effect until modified, superseded, revoked, or repealed. All rights and interests accruing or to accrue under the Securities Act of 1933, or any provision of any regulation relating to, or out of action taken by, the Federal Trade Commission

under such Act, shall be followed in all respects and may be exercised and enforced.

Sec. 28. The Commission is authorized and directed to make a study and investigation of the work, activities, personnel and functions of protective and reorganization committees in connection with the reorganization, readjustments, rehabilitation, liquidation, or consolidation of persons and properties and to report the result of its studies and investigations and its recommendations to the Congress on or before January 3, 1936.[19]

SCHEDULE A

[NOTE: See Appendix, II–B 2, p. 38, for requirements with respect to investment companies.]

(1) The name under which the issuer is doing or intends to do business;

(2) the name of the State or other sovereign power under which the issuer is organized;

(3) the location of the issuer's principal business office, and if the issuer is a foreign or territorial person, the name and address of its agent in the United States authorized to receive notice;

(4) the names and addresses of the directors or persons performing similar functions, and the chief executive, financial and accounting officers, chosen or to be chosen if the issuer be a corporation, association, trust, or other entity; of all partners, if the issuer be a partnership; and of the issuer, if the issuer be an individual; and of the promoters in the case of a business to be formed, or formed within two years prior to the filing of the registration statement;

(5) the names and addresses of the underwriters;

(6) the names and addresses of all persons, if any, owning of record or beneficially, if known, more than 10 per centum of any class of stock of the issuer, or more than 10 per centum in the aggregate of the outstanding stock of the issuer as of a date within twenty days prior to the filing of the registration statement;

(7) the amount of securities of the issuer held by any person specified in paragraphs (4), (5), and (6) of this schedule, as of a date within twenty days prior to the filing of the registration statement, and, if possible, as of one year prior thereto, and the amount of the securities, for which the registration statement is filed, to which such persons have indicated their intention to subscribe;

(8) the general character of the business actually transacted or to be transacted by the issuer;

(9) a statement of the capitalization of the issuer, including the authorized and outstanding amounts of its capital stock and the proportion thereof paid up, the number and classes of shares in which such capital stock is divided, par value thereof, or if it has no par value, the stated or assigned value thereof, a description of the respective voting rights, preferences, conversion and exchange rights, rights to dividends, profits, or capital of each class, with respect to each other class, including the retirement and liquidation rights or values thereof;

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[19] Secs. 27 and 28 are Secs. 210 and 211, Title II, of Securities Exchange Act of 1934, approved June 6, 1934, effective July 1, 1934.

(10) a statement of the securities, if any, covered by options outstanding or to be created in connection with the security to be offered, together with the names and addresses of all persons, if any, to be allotted more than 10 per centum in the aggregate of such options;

(11) the amount of capital stock of each class issued or included in the shares of stock to be offered;

(12) the amount of the funded debt outstanding and to be created by the security to be offered, with a brief description of the date, maturity, and character of such debt, rate of interest, character of amortization provisions, and the security, if any, therefor. If substitution of any security is permissible, a summarized statement of the conditions under which such substitution is permitted. If substitution is permissible without notice, a specific statement to that effect;

(13) the specific purposes in detail and the approximate amounts to be devoted to such purposes, so far as determinable, for which the security to be offered is to supply funds, and if the funds are to be raised in part from other sources, the amounts thereof and the sources thereof, shall be stated;

(14) the remuneration, paid or estimated to be paid, by the issuer or its predecessor, directly or indirectly, during the past year and ensuing year to (a) the directors or persons performing similar functions, and (b) its officers and other persons, naming them wherever such remuneration exceeded $25,000 during any such year;

(15) the estimated net proceeds to be derived from the security to be offered;

(16) the price at which it is proposed that the security shall be offered to the public or the method by which such price is computed and any variation therefrom at which any portion of such security is proposed to be offered to any persons or classes of persons, other than the underwriters, naming them or specifying the class. A variation in price may be proposed prior to the date of the public offering of the security, but the Commission shall immediately be notified of such variation;

(17) all commissions or discounts paid or to be paid, directly or indirectly, by the issuer to the underwriters in respect of the sale of the security to be offered. Commissions shall include all cash, securities, contracts, or anything else of value, paid, to be set aside, disposed of, or understandings with or for the benefit of any other persons in which any underwriter is interested, made, in connection with the sale of such security. A commission paid or to be paid in connection with the sale of such security by a person in which the issuer has an interest or which is controlled or directed by, or under common control with, the issuer shall be deemed to have been paid by the issuer. Where any such commission is paid the amount of such commission paid to each underwriter shall be stated;

(18) the amount or estimated amounts, itemized in reasonable detail, of expenses, other than commissions specified in paragraph (17) of this schedule, incurred or borne by or for the account of the issuer in connection with the sale of the security to be offered or properly chargeable thereto, including legal, engineering, certification, authentication, and other charges;

(19) the net proceeds derived from any security sold by the issuer during the two years preceding the filing of the registration state-

ment, the price at which such security was offered to the public, and the names of the principal underwriters of such security;

(20) any amount paid within two years preceding the filing of the registration statement or intended to be paid to any promoter and the consideration for any such payment;

(21) the names and addresses of the vendors and the purchase price of any property, or goodwill, acquired or to be acquired, not in the ordinary course of business, which is to be defrayed in whole or in part from the proceeds of the security to be offered, the amount of any commission payable to any person in connection with such acquisition, and the name or names of such person or persons, together with any expense incurred or to be incurred in connection with such acquisition, including the cost of borrowing money to finance such acquisition;

(22) full particulars of the nature and extent of the interest, if any, of every director, principal executive officer, and of every stockholder holding more than 10 per centum of any class of stock or more than 10 per centum in the aggregate of the stock of the issuer, in any property acquired, not in the ordinary course of business of the issuer, within two years preceding the filing of the registration statement or proposed to be acquired at such date;

(23) the names and addresses of counsel who have passed on the legality of the issue;

(24) dates of and parties to, and the general effect concisely stated of every material contract made, not in the ordinary course of business, which contract is to be executed in whole or in part at or after the filing of the registration statement or which contract has been made not more than two years before such filing. Any management contract or contract providing for special bonuses or profit-sharing arrangements, and every material patent or contract for a material patent right, and every contract by or with a public utility company or an affiliate thereof, providing for the giving or receiving of technical or financial advice or service (if such contract may involve a charge to any party thereto at a rate in excess of $2,500 per year in cash or securities or anything else of value), shall be deemed a material contract;

(25) a balance sheet as of a date not more than ninety days prior to the date of the filing of the registration statement showing all of the assets of the issuer, the nature and cost thereof, whenever determinable, in such detail and in such form as the Commission shall prescribe (with intangible items segregated), including any loan in excess of $20,000 to any officer, director, stockholder or person directly or indirectly controlling or controlled by the issuer, or person under direct or indirect common control with the issuer. All the liabilities of the issuer in such detail and such form as the Commission shall prescribe, including surplus of the issuer showing how and from what sources such surplus was created, all as of a date not more than ninety days prior to the filing of the registration statement. If such statement be not certified by an independent public or certified accountant, in addition to the balance sheet required to be submitted under this schedule, a similar detailed balance sheet of the assets and liabilities of the issuer, certified by an independent

public or certified accountant, of a date not more than one year prior to the filing of the registration statement, shall be submitted;

(26) a profit and loss statement of the issuer showing earnings and income, the nature and source thereof, and the expenses and fixed charges in such detail and such form as the Commission shall prescribe for the latest fiscal year for which such statement is available and for the two preceding fiscal years, year by year, or, if such issuer has been in actual business for less than three years, then for such time as the issuer has been in actual business, year by year. If the date of the filing of the registration statement is more than six months after the close of the last fiscal year, a statement from such closing date to the latest practicable date. Such statement shall show what the practice of the issuer has been during the three years or lesser period as to the character of the charges, dividends or other distributions made against its various surplus accounts, and as to depreciation, depletion, and maintenance charges, in such detail and form as the Commission shall prescribe, and if stock dividends or avails from the sale of rights have been credited to income, they shall be shown separately with a statement of the basis upon which the credit is computed. Such statement shall also differentiate between any recurring and nonrecurring income and between any investment and operating income. Such statement shall be certified by an independent public or certified accountant;

(27) if the proceeds, or any part of the proceeds, of the security to be issued is to be applied directly or indirectly to the purchase of any business, a profit and loss statement of such business certified by an independent public or certified accountant, meeting the requirements of paragraph (26) of this schedule, for the three preceding fiscal years, together with a balance sheet, similarly certified, of such business, meeting the requirements of paragraph (25) of this schedule of a date not more than ninety days prior to the filing of the registration statement or at the date such business was required by the issuer if the business was acquired by the issuer more than ninety days prior to the filing of the registration statement;

(28) a copy of any agreement or agreements (or if identic agreements are used the forms thereof) made with any underwriter, including all contracts and agreements referred to in paragraph (17) of this schedule;

(29) a copy of the opinion or opinions of counsel in respect to the legality of the issue, with a translation of such opinion, when necessary, into the English language;

(30) a copy of all material contracts referred to in paragraph (24) of this schedule, but no disclosure shall be required of any portion of any such contract if the Commission determines that disclosure of such portion would impair the value of the contract and would not be necessary for the protection of the investors;

(31) unless previously filed and registered under the provisions of this title, and brought up to date, (a) a copy of its articles of incorporation, with all amendments thereof and of its existing bylaws or instruments corresponding thereto, whatever the name, if the issuer be a corporation; (b) copy of all instruments by which the trust is created or declared, if the issuer is a trust; (c) a copy of its articles of partnership or association and all other papers

pertaining to its organization, if the issuer is a partnership, unincorporated association, joint-stock company, or any other form of organization; and

(32) a copy of the underlying agreements or indentures affecting any stock, bonds, or debentures offered or to be offered.

In case of certificates of deposit, voting trust certificates, collateral trust certificates, certificates of interest or shares in unincorporated investment trusts, equipment trust certificates, interim or other receipts for certificates, and like securities, the Commission shall establish rules and regulations requiring the submission of information of a like character applicable to such cases, together with such other information as it may deem appropriate and necessary regarding the character, financial or otherwise, of the actual issuer of the securities and/or the person performing the acts and assuming the duties of depositor or manager.

SCHEDULE B

(1) Name of borrowing government or subdivision thereof;

(2) specific purposes in detail and the approximate amounts to be devoted to such purposes, so far as determinable, for which the security to be offered is to supply funds, and if the funds are to be raised in part from other sources, the amounts thereof and the sources thereof, shall be stated;

(3) the amount of the funded debt and the estimated amount of the floating debt outstanding and to be created by the security to be offered, excluding intergovernmental debt, and a brief description of the date, maturity, character of such debt, rate of interest, character of amortization provisions, and the security, if any, therefor. If substitution of any security is permissible, a statement of the conditions under which such substitution is permitted. If substitution is permissible without notice, a specific statement to that effect;

(4) whether or not the issuer or its predecessor has, within a period of twenty years prior to the filing of the registration statement, defaulted on the principal or interest of any external security, excluding intergovernmental debt, and, if so, the date, amount, and circumstances of such default, and the terms of the succeeding arrangement, if any;

(5) the receipts, classified by source, and the expenditures, classified by purpose, in such detail and form as the Commission shall prescribe for the latest fiscal year for which such information is available and the two preceding fiscal years, year by year;

(6) the names and addresses of the underwriters;

(7) the name and address of its authorized agent, if any, in the United States;

(8) the estimated net proceeds to be derived from the sale in the United States of the security to be offered;

(9) the price at which it is proposed that the security shall be offered in the United States to the public or the method by which such price is computed. A variation in price may be proposed prior to the date of the public offering of the security, but the Commission shall immediately be notified of such variation;

(10) all commissions paid or to be paid, directly or indirectly, by the issuer to the underwriters in respect of the sale of the security to be offered. Commissions shall include all cash, securities, contracts, or anything else of value, paid, to be set aside, disposed of, or understandings with or for the benefit of any other persons in which the underwriter is interested, made, in connection with the sale of such security. Where any such commission is paid, the amount of such commission paid to each underwriter shall be stated;

(11) the amount or estimated amounts, itemized in reasonable detail, of expenses, other than the commissions specified in paragraph (10) of this schedule, incurred or borne by or for the account of the issuer in connection with the sale of the security to be offered or properly chargeable thereto, including legal, engineering, certification, and other charges;

(12) the names and addresses of counsel who have passed upon the legality of the issue;

(13) a copy of any agreement or agreements made with any underwriter governing the sale of the security within the United States; and

(14) an agreement of the issuer to furnish a copy of the opinion or opinions of counsel in respect to the legality of the issue, with a translation, where necessary, into the English language. Such opinion shall set out in full all laws, decrees, ordinances, or other acts of Government under which the issue of such security has been authorized.

TITLE II

Section 201. For the purpose of protecting, conserving, and advancing the interests of the holders of foreign securities in default, there is hereby created a body corporate with the name "Corporation of Foreign Security Holders" (herein called the "Corporation"). The principal office of the Corporation shall be located in the District of Columbia, but there may be established agencies or branch offices in any city or cities of the United States under rules and regulations prescribed by the board of directors.

Sec. 202. The control and management of the Corporation shall be vested in a board of six directors, who shall be appointed and hold office in the following manner: As soon as practicable after the date this Act takes effect the Federal Trade Commission (hereinafter in this title called "Commission") shall appoint six directors, and shall designate a chairman and a vice chairman from among their number. After the directors designated as chairman and vice chairman cease to be directors, their successors as chairman and vice chairman shall be elected by the board of directors itself. Of the directors first appointed, two shall continue in office for a term of two years, two for a term of four years, and two for a term of six years, from the date this Act takes effect, the term of each to be designated by the Commission at the time of appointment. Their successors shall be appointed by the Commission, each for a term of six years from the date of the expiration of the term for which his predecessor was appointed, except that any person appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unex-

pired term of such predecessor. No person shall be eligible to serve as a director who within the five years preceding has had any interest, direct or indirect, in any corporation, company, partnership, bank or association which has sold, or offered for sale any foreign securities. The office of a director shall be vacated if the board of directors shall at a meeting specially convened for that purpose by resolution passed by a majority of at least two-thirds of the board of directors, remove such member from office, provided that the member whom it is proposed to remove shall have seven days' notice sent to him of such meeting and that he may be heard.

Sec. 203. The Corporation shall have power to adopt, alter, and use a corporate seal; to make contracts; to lease such real estate as may be necessary for the transaction of its business; to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal; to require from trustees, financial agents, or dealers in foreign securities information relative to the original or present holders of foreign securities and such other information as may be required and to issue subpenas therefor; to take over the functions of any fiscal and paying agents of any foreign securities in default; to borrow money for the purposes of this title, and to pledge as collateral for such loans any securities deposited with the Corporation pursuant to this title; by and with the consent and approval of the Commission to select, employ, and fix the compensation of officers, directors, members of committees, employees, attorneys, and agents of the Corporation, without regard to the provisions of other laws applicable to the employment and compensation of officers or employees of the United States; to define their authority and duties, require bonds of them and fix the penalties thereof, and to dismiss at pleasure such officers, employees, attorneys, and agents; and to prescribe, amend, and repeal, by its board of directors, bylaws, rules, and regulations governing the manner in which its general business may be conducted and the powers granted to it by law may be exercised and enjoyed, together with provisions for such committees and the functions thereof as the board of directors may deem necessary for facilitating its business under this title. The board of directors of the Corporation shall determine and prescribe the manner in which its obligations shall be incurred and its expenses allowed and paid.

Sec. 204. The board of directors may—

(1) Convene meetings of holders of foreign securities.

(2) Invite the deposit and undertake the custody of foreign securities which have defaulted in the payment either of principal or interest, and issue receipts or certificates in the place of securities so deposited.

(3) Appoint committees from the directors of the Corporation and/or all other persons to represent holders of any class or classes of foreign securities which have defaulted in the payment either of principal or interest and determine and regulate the functions of such committees. The chairman and vice chairman of the board of directors shall be ex officio chairman and vice chairman of each committee.

(4) Negotiate and carry out, or assist in negotiating and carrying out, arrangements for the resumption of payments due or in arrears in respect of any foreign securities in default or for rearranging the

terms on which such securities may in future be held or for converting and exchanging the same for new securities or for any other object in relation thereto; and under this paragraph any plan or agreement made with respect to such securities shall be binding upon depositors, providing that the consent of holders resident in the United States of 60 per centum of the securities deposited with the Corporation shall be obtained.

(5) Undertake, superintend, or take part in the collection and application of funds derived from foreign securities which come into the possession of or under the control or management of the Corporation.

(6) Collect, preserve, publish, circulate, and render available in readily accessible form, when deemed essential or necessary, documents, statistics, reports, and information of all kinds in respect of foreign securities, including particularly records of foreign external securities in default and records of the progress made toward the payment of past-due obligations.

(7) Take such steps as it may deem expedient with the view of securing the adoption of clear and simple forms of foreign securities and just and sound principles in the conditions and terms thereof.

(8) Generally, act in the name and on behalf of the holders of foreign securities the care of representation of whose interests may be entrusted to the Corporation; conserve and protect the rights and interests of holders of foreign securities issued, sold, or owned in the United States; adopt measures for the protection, vindication, and preservation or reservation of the rights and interests of holders of foreign securities either on any default in or on breach or contemplated breach of the conditions on which such foreign securities may have been issued, or otherwise; obtain for such holders such legal and other assistance and advice as the board of directors may deem expedient; and to do all such other things as are incident or conducive to the attainment of the above objects.

Sec. 205. The board of directors shall cause accounts to be kept of all matters relating to or connected with the transactions and business of the Corporation, and cause a general account and balance sheet of the Corporation to be made out in each year, and cause all accounts to be audited by one or more auditors who shall examine the same and report thereon to the board of directors.

Sec. 206. The Corporation shall make, print, and make public an annual report of its operations during each year, send a copy thereof, together with a copy of the account and balance sheet and auditor's report, to the Commission and to both Houses of Congress, and provide one copy of such report but not more than one on the application of any person and on receipt of a sum not exceeding $1: *Provided*, That the board of directors in its discretion may distribute copies gratuitously.

Sec. 207. The Corporation may in its discretion levy charges, assessed on a pro rata basis, on the holders of foreign securities deposited with it: *Provided*, That any charge levied at the time of depositing securities with the Corporation shall not exceed one-fifth of 1 per centum of the face value of such securities: *Provided further*, That any additional charges shall bear a close relationship to the cost of operations and negotiations including those enumerated

in sections 203 and 204 and shall not exceed 1 per centum of the face value of such securities.

SEC. 208. The Corporation may receive subscriptions from any person, foundation with a public purpose, or agency of the United States Goverment, and such subscriptions may, in the discretion of the board of directors, be treated as loans repayable when and as the board of directors shall determine.

SEC. 209. The Reconstruction Finance Corporation is hereby authorized to loan out of its funds not to exceed $75,000 for the use of the Corporation.

SEC. 210. Notwithstanding the foregoing provisions of this title, it shall be unlawful for, and nothing in this title shall be taken or construed as permitting or authorizing, the Corporation in this title created, or any committee of said Corporation, or any person or persons acting for or representing or purporting to represent it—

(a) to claim or assert or pretend to be acting for or to represent the Department of State or the United States Government;

(b) to make any statements or representations of any kind to any foreign government or its officials or the officials of any political subdivision of any foreign government that said Corporation or any committee thereof or any individual or individuals connected therewith were speaking or acting for the said Department of State or the United States Government; or

(c) to do any act directly or indirectly which would interfere with or obstruct or hinder or which might be calculated to obstruct, hinder or interfere with the policy or policies of the said Department of State or the Government of the United States or any pending or contemplated diplomatic negotiations, arrangements, business or exchanges between the Government of the United States or said Department of State and any foreign government or any political subdivision thereof.

SEC. 211. This title shall not take effect until the President finds that its taking effect is in the public interest and by proclamation so declares.

SEC. 212. This title may be cited as the "Corporation of Foreign Bondholders Act, 1933."

Approved May 27th 1933.

APPENDIX

Provisions of Federal Laws Relating to the SECURITIES ACT OF 1933 as Amended

I. EXEMPTIONS

In addition to Sections 3 and 4 of the Securities Act of 1933, as amended, the following should be considered:

A. Section 264 of the National Bankruptcy Act, as amended June 22, 1938 (c. 575, § 1, 52 Stat. 902) :[1]

"a. The provisions of section 5 of the Securities Act of 1933 shall not apply to—

"(1) any security issued by the receiver, trustee, or debtor in possession pursuant to paragraph (2) of section 116[2] of this Act; or

"(2) any transaction in any security issued pursuant to a plan in exchange for securities of or claims against the debtor or partly in such exchange and partly for cash and/or property, or issued upon exercise of any right to subscribe or conversion privilege so issued, except (a) transactions by an issuer or an underwriter in connection with a distribution otherwise than pursuant to the plan, and (b) transactions by a dealer as to securities constituting the whole or a part of an unsold allot-

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[1] Sec. 7 of the amendatory Act provides that the Act shall "take effect and be in force on and after three months from the date of its approval." Sec. 276. c. provides as follows with respect to pending proceedings under secs. 77A and 77B of the Bankruptcy Act:

"c. the provisions of sections 77A and 77B of chapter VIII, as amended, of the Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898, shall continue in full force and effect with respect to proceedings pending under those sections upon the effective date of this amendatory Act, except that—

"(1) if the petition in such proceedings was approved within three months prior to the effective date of this amendatory Act, the provisions of this chapter shall apply in their entirety to such proceedings; and

"(2) if the petition in such proceedings was approved more than three months before the effective date of this amendatory Act, the provisions of this chapter shall apply to such proceedings to the extent that the judge shall deem their application practicable: and * * *."

[2] Par. (2) of sec. 116 of the Bankruptcy Act, as amended June 22, 1938, c. 575, § 1, 52 Stat. 885:

"Sec. 116. Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon him and the court—

* * * * * * *

"(2) authorize a receiver, trustee, or debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to issue certificates of indebtedness for cash, property, or other consideration approved by the judge, upon such terms and conditions and with such security and priority in payment over existing obligations, secured or unsecured, as in the particular case may be equitable;"

ment to or subscription by such dealer as a participant in a distribution of such securities by the issuer or by or through an underwriter otherwise than pursuant to the plan.

"b. As used in this section, the terms 'security,' 'issuer,' 'underwriter,' and 'dealer' shall have the meanings provided in Section 2 of the Securities Act of 1933, and the term 'Securities Act of 1933' shall be deemed to refer to such Act as heretofore or hereafter amended."

[NOTE: Sec. 264, which is contained in chap. X of the amendatory Act entitled "Corporate Reorganization," is to replace the following excerpt from subdivision (h) of sec. 77B of the Bankruptcy Act as contained in c. 424, 48 Stat. 920, approved June 7, 1934:

"* * * All securities issued pursuant to any plan of reorganization confirmed by the court in accordance with the provisions of this section, including, without limiting the generality of the foregoing, any securities issued pursuant to such plan for the purpose of raising money for working capital and other purposes of such plan and securities issued by the debtor or by the trustee or trustees pursuant to subdivision (c), clause (3), of this section, and all certificates of deposit representing securities of or claims against the debtor which it is proposed to deal with under any such plan, shall be exempt from all the provisions of the Securities Act of 1933, approved May 27, 1933, except the provisions of subdivision (2) of section 12, and section 17 thereof, and except the provisions of section 24 thereof as applied to any willful violation of said section 17."

Subdivision (c), clause (3), referred to in the above excerpt from sec. 77B, reads as follows:

"(c) Upon approving the petition or answer or at any time thereafter, the judge, in addition to the jurisdiction and powers elsewhere in this section conferred upon him, * * * (3) may, for cause shown, authorize the debtor or the trustee or trustees, if appointed, to issue certificates for cash, property, or other consideration approved by the judge for such lawful purposes, and upon such terms and conditions and with such security and such priority in payments over existing obligations, secured or unsecured, as may be lawful in the particular case; * * *."

The effect of sec. 264 and its relation to sec. 77B (h) is discussed in the following excerpt from S. Rept. No. 1916, 75th Cong. (3d sess.), at p. 38:

"Section 264 is derived in part from section 77B (h). Under this provision no registration in compliance with the Securities Act of 1933 is required for the issuance of securities to the security holders or creditors of the debtor in whole or part exchange for their old securities or claims. However, new issues sold by the reorganized company for cash are required to be registered under the Securities Act just as any other new issues of securities, in order that prospective investors may have all material information before buying. Furthermore, the exemption for the issuance of securities to security holders and creditors under the plan does not extend to any subsequent redistribution of such securities by the issuer or an underwriter; for any such redistribution is subject to the same need for public disclosure of relevant data as in the case of a new issue. This need for registration upon redistribution has been recognized by the Securities and Exchange Commission in its interpretation of section 77B (h), but the revision embodied in section 264 is designed to remove all doubt as to the correctness of that interpretation."]

B. Section 393 of the National Bankruptcy Act, as amended June 22, 1938, c. 575, § 1, 52 Stat. 914:

"a. The provisions of section 5 of the Securities Act of 1933 shall not apply to—

"(1) any security issued by a receiver, trustee, or debtor in possession pursuant to section 344 of this Act;[3] or

"(2) any transaction in any security issued pursuant to an arrangement in exchange for securities of or claims against the debtor or partly in such exchange and partly for cash and/or property, or issued upon exercise of any right to subscribe or conversion privilege so issued, except (a) transactions by an issuer or an underwriter in connection with a distribution otherwise than pursuant to the arrangement, and (b) transactions by a dealer as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in a distribution of such securities by the issuer or by or through an underwriter otherwise than pursuant to the arrangement.

"b. As used in this section, the terms 'security,' 'issuer,' 'underwriter,' and 'dealer' shall have the meanings provided in section 2 of the Securities Act of 1933, and the term 'Securities Act of 1933' shall be deemed to refer to such Act as heretofore or hereafter amended."

[NOTE: Sec. 393 is contained in chap. XI of the amendatory Act, entitled "Arrangements."]

C. Section 518 of the National Bankruptcy Act, as amended June 22, 1938, c. 575, § 1, 52 Stat. 928, Public No. 696, 75th Congress, approved June 22, 1938:

"a. The provisions of section 5 of the Securities Act of 1933 shall not apply to—

"(1) any security issued by a trustee or debtor in possession pursuant to section 446 of this Act;[4] or

"(2) any transaction in any security issued pursuant to an arrangement in exchange for securities of or claims against the debtor or partly in such exchange and partly for cash and/or property, or issues upon exercise of any right to subscribe or conversion privilege so issued, except (a) transactions by an issuer or an underwriter in connection with a distribution otherwise than pursuant to the arrangement, and (b) transactions by a dealer as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in a distribution of such securities by the

[3] Sec. 344 of the Act, referred to in sec. 393, a. (1), reads as follows:

"SEC. 344. During the pendency of a proceeding for an arrangement, or after the confirmation of the arrangement where the court has retained jurisdiction, the court may upon cause shown authorize the receiver or trustee, or the debtor in possession, to issue certificates of indebtedness for cash, property, or other consideration approved by the court, upon such terms and conditions and with such security and priority in payment over existing obligations as in the particular case may be equitable."

[4] Sec. 446, referred to in sec. 518, reads as follows:

"SEC. 446. During the pendency of a proceeding for an arrangement, or after the confirmation of the arrangement where the court has retained jurisdiction, the court may upon cause shown authorize the trustee or debtor in possession to issue certificates of indebtedness for cash, property, or other consideration approved by the court, upon such terms and conditions and with such security and priority in payment over existing obligations as in the particular case may be equitable."

issuer or by or through an underwriter otherwise than pursuant to the arrangement.

"b. As used in this section, the terms 'security,' 'issuer,' 'underwriter,' and 'dealer' shall have the meanings provided in section 2 of the Securities Act of 1933, and the term 'Securities Act of 1933' shall be deemed to refer to such Act as heretofore or hereafter amended."

[NOTE: Sec. 518 is contained in chap. XII of the amended Act entitled "Real Property Arrangements by Persons other than Corporations."]

D. Excerpt from subdivision (f) of section 77 of the Bankruptcy Act, as amended August 27, 1935 (c. 774, 49 Stat. 920):

"* * * The provisions of title I and of section 5 of the Securities Act of 1933, as amended, shall not apply to the issuance, sale, or exchange of any of the following securities, which securities and transactions therein shall, for the purposes of said Securities Act, be treated as if they were specifically mentioned in sections 3 and 4 of the said Securities Act, respectively: (1) All securities issued pursuant to any plan of reorganization confirmed by the judge in accordance with the provisions of this section; (2) all securities issued pursuant to such plan for the purpose of raising money for working capital and other purposes of such plan; (3) all securities issued by the debtor or by the trustee or trustees pursuant to subdivision (c), clause (3) of this section;[5] (4) all certificates of deposit representing securities of, or claims against, the debtor, with the exception of such certificates of deposit as are issued by committees not subject to subsection (p) hereof. The provisions of subdivision (a) of section (14) of the Securities Exchange Act of 1934 shall not be applicable with respect to any action or matter which is within the provisions of subsection (p) hereof."[6]

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[5] Subdivision (c), clause (3), referred to in the above excerpt, reads as follows:

"(c) After approving the petition:

* * * * * * *

"(3) The judge may, upon not less than fifteen days' notice published in such manner and in such newspapers as the judge may in his discretion determine, which notice so determined shall be sufficient, for cause shown, and with the approval of the Commission [Interstate Commerce Commission], in accordance with section 20 (a) of the Interstate Commerce Act, as now or hereafter amended, authorize the trustee or trustees to issue certificates for cash, property, or other consideration approved by the judge, for such lawful purposes and upon such terms and conditions and with such security and such priority in payments over existing obligations, secured or unsecured, or receivership charges, as might in an equity receivership be lawful."

[6] Subsection (p), referred to in the above excerpt, reads as follows:

"(p) It shall be unlawful for any person, during the pendency of proceedings under this section or of receivership proceedings against a railroad corporation in any State or Federal court, (a) to solicit, or permit the use of his name to solicit, from any creditor or shareholder of any railroad corporation by or against whom such proceedings have been instituted, any proxy or authorization to represent any such creditor or shareholder in such proceedings or in any matters relating to such proceedings, or to vote on his behalf for or against, or to consent to or reject, any plan of reorganization proposed in connection with such proceedings; or (b) to use, employ, or act under or pursuant to any such proxy or authorization from any such creditor or shareholder which has been solicited or obtained prior to the institution of such proceedings; or (c) to solicit the deposit by any such creditor, or shareholder, of his claim against or interest in such railroad corporation, or any instrument evidencing the same, under any agreement authorizing anyone other than such depositor to represent such depositor in such proceedings or in any matters relating to such proceedings, including any matters relating to the deposited security or claim; or to vote such claim or interest or to consent to or reject

E. Section 3 (a) (6) of the Securities Act exempts from the registration provisions of that act "any security issued by a common or contract carrier, the issuance of which is subject to the provisions of section 20a of the Interstate Commerce Act, as amended:"

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any such plan of reorganization; or (d) to use, employ, or act under or pursuant to any such agreement with such depositor which has been solicited or obtained prior to the institution of such proceedings; unless and until, upon proper application by any person proposing to make such solicitation or to use, employ, or act under or pursuant to such proxies, authorizations, or deposit agreements, and after consideration of the terms and conditions (including provisions governing the compensation and expenses to be received by the applicant, its agents and attorneys, for their services) upon which it is proposed to make such solicitation or to use, employ, or act under or pursuant to such proxies, authorizations, or deposit agreements, the Commission [Interstate Commerce Commission] after hearing by order authorizes such solicitation, use, employment, or action: ***Provided, however,*** That nothing contained in this section shall be applicable to or construed to prohibit any person, when not part of an organized effort, from acting in his own interest, and not for the interest of any other, through a representative or otherwise, or from authorizing a representative to act for him in any of the foregoing matters, or to prohibit groups of not more than twenty-five bona fide holders of securities or claims or groups of mutual institutions from acting together for their own interests and not for others through representatives or otherwise or from authorizing representatives of such groups to act for them in respect to any of the foregoing matters. The Commission shall make such order only if it finds that the terms and conditions upon which such solicitation, use, employment, or action is proposed are reasonable, fair, and in the public interest, and conform to such rules and regulations as the Commission may provide. The Commission shall have the power to make such rules and regulations respecting such solicitation, use, employment, or action and with respect to the terms and the provisions of such proxies, authorizations, and deposit agreements, and with respect to such other matters in connection with the administration of this subsection as it deems necessary or desirable to promote the public interest, and to insure proper practices in the representation of creditors and stockholders through the use of such proxies, authorizations, or deposit agreements and in the solicitation thereof. It shall be unlawful for any person to solicit any such proxy, authorization, or the deposit of any such claim or interest or to use, employ, or act under or pursuant to any such proxy, authorization, or deposit agreement which has been solicited or obtained prior to the institution of such proceedings in violation of the rules and regulations so prescribed.

"Every application for authority shall be made in such form and contain such matters as the Commission may prescribe. Every such application shall be made under oath, signed by, or on behalf of, the applicant by a duly authorized agent having knowledge of the matters therein set forth. The Commission may modify any order authorizing such solicitation, use, employment, or action by a supplemental order, but no such modification shall invalidate action previously taken, or rights or obligations which have previously arisen, in conformity with the Commission's prior order or orders authorizing such solicitation, use, employment, or action.

"The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this subsection (p) or any rule or regulation thereunder, and may require or permit any person to file with it a statement in writing, under oath, or otherwise, as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized, in its discretion, to publish information concerning any such violations, and to investigate any such facts, conditions, practices, or matters as it may deem necessary or proper to aid in the enforcement of the provisions of this subsection (p), in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this subsection relates.

"Any person who willfully violates any provision of this subsection, or any rule or regulation made thereunder the violation of which is made unlawful, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed hereunder or under any rule or regulation authorized hereby, which statement is false or misleading with respect to any material fact, shall be guilty of a misdemeanor, and on conviction in any United States court having jurisdiction, shall be punished by a fine of not less than $1,000 nor more than $10,000 or by imprisonment for not less than one year nor more than three years, or by both such fine and imprisonment, in the discretion of the court; but no person shall be subject to imprison-

Section 20a of the Interstate Commerce Act defines carriers as follows:

> "(1) *Carrier defined.*—As used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this chapter, or any corporation organized for the purpose of engaging in transportation by railroad subject to this chapter."

Subsection (2) of section 20a describes the securities which are subject to the jurisdiction of the Interstate Commerce Commission as follows:

> "§ 20a. (2) *Issuance of securities; assumption of obligations; authorization.*—It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

In addition to the carriers whose securities were originally subject to the jurisdiction of the Interstate Commerce Commission under sec-

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ment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

"The provisions of this subsection (p) shall not be applicable to any person or committee which has begun to solicit, obtain, or use proxies, authorizations, or deposit agreements prior to the effective date of this amendatory section in connection with proceedings under this section as in force prior to such effective date or receivership proceedings against a railroad then pending in any State or Federal court, unless such person or committee makes application to the Commission and receives authority to act as in this subsection provided, in which event the provisions of this subsection (p) shall be applicable to such person or committee, but such authorization shall not be upon terms which shall invalidate any action theretofore taken, or any rights or obligations which have theretofore arisen: *Provided,* That with respect to committees which are not subject to this subsection (p) the judge shall scrutinize and may disregard any limitations or provisions of any deposit agreements, committee, or other authorizations affecting any creditor or stockholder acting under this section and may enforce an accounting thereunder or restrain the exercise of any power which he finds to be unfair or not consistent with public policy, including the collection of unreasonable amounts for compensation and expenses."

tion 20a, section 214 of the Motor Carrier Act of 1935 (approved August 9, 1935; 49 Stat. 543, amended June 29, 1938, c. 811, § 15; 52 Stat. 1240) added the following classification:

"Common and contract carriers by motor vehicle, corporations organized for the purpose of engaging in transportation as such carriers, and corporations authorized by order entered under section 213 (a) (1) to acquire control of any such carrier, or of two or more such carriers, shall be subject to the provisions of paragraphs 2 to 11, inclusive, of section 20a of part I of this Act (including penalties applicable in cases of violations thereof): *Provided*, *however*, That said provisions shall not apply to such carriers or corporations where the par value of the securities to be issued, together with the par value of the securities then outstanding, does not exceed $500,000. Nor to the issuance of notes of a maturity of two years or less and aggregating not more than $100,000, which notes aggregating such amount including all outstanding obligations maturing in two years or less may be issued without reference to the percentage which said amounts bear to the total amount of outstanding securities. In the case of securities having no par value, the par value for the purpose of this section shall be the fair market value as of the date of their issue: *Provided further*, That the exemption in section 3 (a) (6) of the 'Securities Act of 1933,' is hereby amended to read as follows: (6) Any security issued by a common or contract carrier, the issuance of which is subject to the provisions of section 20a of the Interstate Commerce Act as amended;"

[Note: Consideration should be given to sec. 705 (5) of chap. XV of the National Bankruptcy Act as amended by Public No. 242, 76th Cong., approved July 28, 1939, dealing with railroad adjustments, which provides that for the purposes of that chapter the term "securities" shall include, in addition to those defined in sec. 20a of the Interstate Commerce Act, certificates of deposit and all other evidences of ownership of or interest in securities.]

F. Subdivision (5) of subsection (a) of section 304 of the Trust Indenture Act of 1939 (see below):

Sec. 304 (a). The provisions of this title shall not apply to any of the following securities:

* * * * * * *

"(5) any security issued under a mortgage indenture as to which a contract of insurance under the National Housing Act is in effect; and any such security shall be deemed to be exempt from the provisions of the Securities Act of 1933 to the same extent as though such security were specifically enumerated in section 3 (a) (2) of such Act; * * *."

G. Section 24 (d) of the Investment Company Act of 1940 (Public No. 768, 76th Congress, approved August 22, 1940):

"The exemption provided by paragraph 8 of Section 3 (a) of the Securities Act of 1933 shall not apply to any security

of which an investment company [7] is the issuer. The exemption provided by paragraph 11 of said Section 3 (a) shall not apply to any security of which a registered investment company [8] is the issuer, except a security sold or disposed of by the issuer or bona fide offered to the public prior to the effective date of this title,[9] and with respect to a security so sold, disposed of or offered shall not apply to the new offering thereof on or after the effective date of this title." [9]

II. REGISTRATION STATEMENTS

A. The Trust Indenture Act of 1939 (Public No. 253, 76th Cong., approved August 3, 1939) requires that bonds, notes, debentures and similar securities publicly offered for sale, sold, or delivered after sale through the mails or interstate commerce (except as specifically exempted by the act) be issued under an indenture which meets the requirements of the act and has been duly qualified with the Securities and Exchange Commission. With respect to such securities the requirements of both the Trust Indenture Act of 1939 and the Securities Act of 1933 must be considered.

B. In addition to sections 6 and 7 of the Securities Act of 1933, as amended, the following should also be considered:

1. Section 204 (h) of the Federal Water Power Act, as amended by section 213 of title II of the Public Utility Act of 1935, Public No. 333, 74th Congress, approved August 26, 1935:

> "(h) Any public utility whose security issues are approved by the Commission under this section may file with the Securities and Exchange Commission duplicate copies of reports filed with the Federal Power Commission in lieu of the reports, information, and documents required under section 7 of the Securities Act of 1933 and sections 12 and 13 of the Securities Exchange Act of 1934."

2. Section 24 (a) of the Investment Company Act of 1940, Public No. 768, 76th Congress, approved August 22, 1940:

> "In registering under the Securities Act of 1933 any security of which it is the issuer, a registered investment company, in lieu of furnishing a registration statement containing the information and documents specified in Schedule A of said Act, may file a registration statement containing the following information and documents:
>
> "(1) such copies of the registration statement filed by such company under this title, and of such reports filed by such company pursuant to Section 30 or such copies

[7] The term "investment company" is defined in Section 3 of the Investment Company Act of 1940.

[8] The term "investment company" is defined in Section 3 of the Investment Company Act of 1940. A registered investment company is an investment company registered under Section 8 of the Act.

[9] Section 53 of the Investment Company Act makes the Act effective on November 1, 1940, except that in the case of face amount certificates and face amount certificate companies, as defined in Sections 2 (a) (15) and 4 (1) of the Act, the effective date is January 1, 1941.

of portions of such registration statement and reports, as the Commission shall designate by rules and regulations; and

"(2) such additional information and documents (including a prospectus) as the Commission shall prescribe by rules and regulations as necessary or appropriate in the public interest or for the protection of investors."

3. Section 38 (b) of the Investment Company Act of 1940, Public No. 768, 76th Congress, approved August 22, 1940:

"The Commission, by such rules and regulations or order as it deems necessary or appropriate in the public interest or for the protection of investors, may authorize the filing of any information or documents required to be filed with the Commission under this title, Title II of this Act, the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, or the Trust Indenture Act of 1939, by incorporating by reference any information or documents theretofore or concurrently filed with the Commission under this title or any of such Acts."

4. Section 308 of the Trust Indenture Act of 1939, Public No. 253, 76th Congress, approved August 3, 1939:

"(a) The Commission, by such rules and regulations or orders as it deems necessary or appropriate in the public interest or for the protection of investors, shall authorize the filing of information or documents required to be filed with the Commission under this title, or under the Securities Act of 1933, the Securities Exchange Act of 1934, or the Public Utility Holding Company Act of 1935, by incorporating by reference any information or documents on file with the Commission under this title or under any such Act."

5. Subsection (d) of section 15 of the Securities Exchange Act of 1934, as amended by section 3 of Public No. 621, 74th Congress, approved May 27, 1936:

"(d) Each registration statement hereafter filed pursuant to the Securities Act of 1933, as amended, shall contain an undertaking by the issuer of the issue of securities to which the registration statement relates to file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, such supplementary and periodic information, documents, and reports as may be required pursuant to Section 13 of this title in respect of a security listed and registered on a national securities exchange; but such undertaking shall become operative only if the aggregate offering price of such issue of securities, plus the aggregate value of all other securities of such issuer of the same class (as hereinafter defined) outstanding, computed upon the basis of such offering price, amounts to $2,000,000 or more. The issuer shall file such supplementary and periodic information, documents, and reports pursuant to such undertaking, except that the duty to file shall be automatically suspended if and so long as (1) such

issue of securities is listed and registered on a national securities exchange, or (2) by reason of the listing and registration of any other security of such issuer on a national securities exchange, such issuer is required to file pursuant to Section 13 of this title, information, documents, and reports substantially equivalent to such as would be required if such issue of securities were listed and registered on a national securities exchange, or (3) the aggregate value of all outstanding securities of the class to which such issue belongs is reduced to less than $1,000,000, computed upon the basis of the offering price of the last issue of securities of said class offered to the public. For the purposes of this subsection, the term 'class' shall be construed to include all securities of an issuer which are of substantially similar character and the holders of which enjoy substantially similar rights and privileges. Nothing in this subsection shall apply to securities issued by a foreign government or political subdivision thereof or to any other security which the Commission may by rules and regulations exempt as not comprehended within the purposes of this subsection."

[NOTE: The various penalties imposed upon failure to perform the undertakings provided for by section 15 (d) of the Securities Exchange Act of 1934, or for filing false statements in connection therewith, are contained in sections 21 (f) and 32 (a) and (b) of said Act.]

C. In addition to section 10 of the Securities Act of 1933, as amended, the following should also be considered in relation to certain investment company securities:

Section 24 (c) of the Investment Company Act of 1940, Public No. 768, 76th Congress, approved August 22, 1940:

"In addition to the powers relative to prospectuses granted the Commission by Section 10 of the Securities Act of 1933, the Commission is authorized to require, by rules and regulations or order, that the information contained in any prospectus relating to any periodic payment plan certificate or face-amount certificate registered under the Securities Act of 1933 on or after the effective date of this title be presented in such form and order of items, and such prospectus contain such summaries of any portion of such information, as are necessary or appropriate in the public interest or for the protection of investors."

D. The following should be considered in connection with the application of section 8 (d):

Section 14 (a) of the Investment Company Act of 1940, Public No. 768, 76th Congress, approved August 22, 1940:

"No registered investment company organized after the date of enactment of this title, and no principal underwriter for such a company, shall make a public offering of securities of which such company is the issuer, unless—

"(1) such company has a net worth of at least $100,000;

"(2) such company has previously made a public offering of its securities, and at the time of such offering had a net worth of at least $100,000; or

"(3) provision is made in connection with and as a condition of the registration of such securities under the Securities Act of 1933 which in the opinion of the Commission adequately insures (A) that after the effective date of such registration statement such company will not issue any security or receive any proceeds of any subscription for any security until firm agreements have been made with such company by not more than twenty-five responsible persons to purchase from it securities to be issued by it for an aggregate net amount which plus the then net worth of the company, if any, will equal at least $100,000; (B) that said aggregate net amount will be paid in to such company before any subscription for such securities will be accepted from any persons in excess of twenty-five; (C) that arrangements will be made whereby any proceeds so paid in, as well as any sales load, will be refunded to any subscriber on demand without any deduction, in the event that the net proceeds so received by the company do not result in the company having a net worth of at least $100,000 within ninety days after such registration statement becomes effective.

"At any time after the occurrence of the event specified in Clause (C) of paragraph (3) of this subsection the Commission may issue a stop order suspending the effectiveness of the registration statement of such securities under the Securities Act of 1933 and may suspend or revoke the registration of such company under this title."

E. Section 308 of the Trust Indenture Act of 1939, Public No. 253, 76th Congress, approved August 3, 1939:

"(b) The Commission, by such rules and regulations or orders as it deems necessary or appropriate in the public interest or for the protection of investors, shall provide for the consolidation of applications, reports and proceedings under this title with registration statements, applications, reports, and proceedings under the Securities Act of 1933, the Securities Exchange Act of 1934, or the Public Utility Holding Company Act of 1935."

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TOPICAL INDEX.

PAGE

Statement of Facts 1

Statement of the Case 6

Assignment of Errors and Points Upon Which Appellant Relies in This Appeal 15

I.

The Indictment Fails to State an Offense Against the Laws of the United States. The Demurrer to These Counts Should Have Been Sustained 17

II.

The District Court Erred in Holding That Where There Has Been Full and Fair Disclosure of the Character of the Securities Involved to the Officials of the State by a State Corporation, Doing Its Principal Business in That State, and the Only Transactions Involved in the Particular Convictions Were Within a County of the State, That the Securities and Exchange Act Is Applicable to This Case 18

III.

Where Stock Is Personally Owned and It Is Not Charged That There Is Anything Fraudulent or Improper in the Sale or Dealings, an Act of Congress, if Construed to Apply to the Sale of Such Personaly Owned Stock, Would Offend the Fifth Amendment to the Constitution of the United States, Holding That No Person Can be Deprived of Property Without Due Process of Law 26

PAGE

IV.

Where a Defendant Is Tried by a Jury and One of the Vital Questions to be Determined Is Whether He Owned the Stock Personally, and if He Did, That it Would be Exempt Under the Law, the Trial Court Invades the Province of the Jury When it Instructs Them That is Is Immaterial Whether the Stock Is Personally Owned or Not 28

V.

The Securities and Exchange Act Shows an Intent to Provide a Different Regulation for the Use of the Mails Than for Interstate and Foreign Commerce 29

VI.

The Evidence Is Insufficient to Support the Charges Set Forth in Counts 14, 15 and 16. It Affirmatively Establishes Exemptions Under Section 77d of the Act of 1933, as to the Transactions Charged in These Counts 30

The Government Having Produced Him Is Bound by His Testimony 32

There Is No Proof That Appellant Caused Any Mailing 32

The Stocks Were Not a Transaction by Any Issuer, Underwriter or Dealer. There Was No Public Offering 41

Nor Was There a Public Offering 41

VIII.

The Trial Court Erred in Instructing the Jury 42

IX.

The District Court Erred in Sustaining the Demurrer to the Plea in Abatement and in Holding That the Appellant Was Not Immune When He Appeared Before the Commission in Response to a Subpoena and Testified as a Witness on Behalf of the Government With Reference to the "Matter of Consolidated Mines of California" 48

X.

Appellant Entitled to Trial by Jury on Issue of Facts 57

Conclusion 61

TABLE OF AUTHORITIES CITED.

CASES. PAGE

Arndstein v. McCarthy, 65 L. Ed. 138 54
Benson v. United States, 112 F. (2d) 422 40
Bettencourt v. Sheely, 157 Cal. 698 19
Billings v. Hall, 7 Cal. 1, 6 27
Blumenthal v. Larson, 79 Cal. App. 726 19
Brady v. United States, 24 Fed. 399 39
Brown v. Walker, 161 U. S. 819, 40 L. Ed. 819 49
Clark, Ex parte, 103 Cal. 352 49
Cohen, Ex parte, 104 Cal. 524 49
Collins v. N. H., 171 U. S. 30, 43 L. Ed. 60, 62 23
Consolidated Mines of Calif. v. Securities and Exchange Comm., 79 F. (2d) 704 .... 11, 27, 46, 47
Counselman v. Hitchcock, 142 U. S. 547 .... 49, 53, 54, 55, 61
Critchlow, In re, 11 Cal. (2d) 751 49
Dunn v. United States, 284 U. S. 390, 70 L. Ed. 356 .... 23, 41
Electric Bond and Share Co. v. Securities and Exchange Comm., 92 Fed. (2d) 580 .... 18, 21, 22, 29
Entick v. Carrington, 19 How. St. Tr. 1030 56
Firthman, In re, 118 Cal. App. 332 19
Freeman v. United States, 20 Fed. (2d) 748 .... 36, 37, 38, 39
Hale v. Henkel, 26 Sup. Ct. 370 49
Hannon v. United States, 9 F. (2d) 933 40
Hysler v. Florida, 86 L. Ed. 584 20
Interstate Commerce Comm. v. Baird, 48 L. Ed. 860 54
Irvin v. Zerbst, 97 F. (2d) 257 61
Jones v. United States (9th Cir.), 179 F. 584 61
Keller v. United States, 213 U. S. 138, 144-146, 53 L. Ed. 737 23
Lane County v. Ore., 7 Wall. 71, 19 L. Ed. 101 24
Lewis v. United States, 92 F. (2d) 952 40

PAGE

Lisenba v. California, 86 L. Ed. 179, 190 20
McAffee v. United States, 105 F. (2d) 21 40
McCulloch v. Md., 4 Wheat. 316, 4 L. Ed. 579 23
Neece v. Northern Pacific R. R. Co., 211 Fed. 254 19
Olmstead v. United States, 277 U. S. 944, 72 L. Ed. 438 55
O'Shea, In re, 166 F. 180 54
Pacific Railroad Comm., In re, 32 F. 241 56
People v. Butler, 201 Ill. 236, 248, 66 N. E. 349 49
People v. Davenport, 21 Cal. App. (2d) 292 .... 18, 27
People v. Pace, 73 Cal. App. 548 27
People v. Schidtz, 7 Cal. App. 330 18
People v. Schwartz, 78 Cal. App. 561 49
People v. Sharp, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851 49
People v. Terrill, 127 Cal. 100 18
Quarb, Ex parte, 149 Cal. 79 27
Rosenberg v. United States, 120 Fed. (2d) 935 39
Rudnick v. Bischoff, 17 N. Y. S. (2d) 575 32
Securities and Exchange Comm. v. Sunbeam Gold Mining Co., 95 F. (2d) 699 41
Sharon v. Sharon, 75 Cal. 16 19
Sherwin v. United States, 268 U. S. 368, 69 L. Ed. 1001 58
Spann v. Zerbst, 99 F. (2d) 336 61
Stanton v. United States, 281 U. S. 276 61
State v. Quarles, 13 Ark. 307, quoted in 142 U. S. 567, 12 Sup. Ct. 199, 35 L. Ed. 1110 49
Troutman v. United States, 100 F. (2d) 628 40
United States v. Armour & Co., 142 Fed. Rep. 808 49
United States v. Cruickshank, 92 U. S. 542, 23 L. Ed. 588 17
United States v. Dewitt, 9 Wall. 41, 19 L. Ed. 593 23

PAGE

United States v. El Paso & N. E. R. Co., 178 F. 846 17

United States v. Goldman, 28 Fed. (2d) 424 ..... 49, 50, 54

Williams, In re, 127 Cal. App. 424 49

Statutes.

Corporate Securities Act of California, Section 4 (Act 3814, General Laws, pages 1768, 1772, Deering's Code) 1, 12

Securities Act of 1933, Section 22(c) as amended, 15 U. S. C. A., Section 77v(c) 48

Securities & Exchange Act:

- Section 2, subdivision 4 28
- Section 2, subdivision 7 24
- Section 3 24
- Section 3, subdivision 11 24
- Section 4 24
- Section 4 (1) 41
- Section 4, subdivision 1 28
- Section 77b, par. 11 ..... 43, 46
- Section 77d 30, 41, 66
- Section 77e 30, 43, 46
- Section 77e (1) 46

United States Constitution, Sections 2 and 6 28

United States Constitution, Sixth and Seventh Amendments 28

Textbooks.

Cooley, Constitutional Limitations, 7th Ed., p. 11 23

Cooley's Statutory Rights, p. 68 27

No. 9916

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM JACKSON SHAW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Statement of Facts.

Consolidated Mines of California is a California corporation organized under the laws of the State of California with a valid permit from the Commissioner of Corporations of the State of California to sell stock [R. 188]. Within the State of California was the only place where sales were consummated [R. 188]. The officers of the company were Henry L. Wikoff, president; Frank S. Tyler, secretary, and W. J. Morgan, executive vice president [R. 194].

To secure a permit under the laws of the State of California Section 4 of the Corporate Securities Act of California, Act 3814, General Laws, pages 1768, 1772, Deer-

ing's Code, with which the Consolidated Mines of California complied, provides as follows:

> "*Investigation of application: Issuance of permit: Contents of permit: Replacement securities: Action as escrow holder.* Upon the filing of such application, it shall be the duty of the commissioner to examine it and the other papers and documents filed therewith, and he may, if he deems it advisable, make or have made a detailed examination, audit and investigation of the applicant and its affairs. If he finds that the proposed plan of business of the applicant *is not unfair, unjust, or inequitable, that it intends to fairly and honestly transact its business,* and that the securities that it proposes to issue and the method to be used by it in issuing or disposing of them *are not such as, in his opinion, will work a fraud upon the purchaser thereof,* the commissioner shall issue to the applicant a permit authorizing it to issue and dispose of securities, as therein provided, in this State, in such amounts and for such considerations and upon such terms and conditions as the commissioner may in said permit provide. Otherwise, he shall deny the application and refuse such permit and notify the applicant in writing of his decision. Every permit shall recite in bold type that the issuance thereof is permissive only and does not constitute a recommendation or endorsement of the securities permitted to be issued. The commissioner may impose conditions requiring the deposit in escrow of securities, the impoundment of the proceeds from the sale thereof, limiting the expense in connection with the sale thereof and such other conditions as he may deem reasonable and necessary or advisable to insure the disposition of the proceeds of such securities in the manner and for the purposes provided in such permit." (Italics ours.)

This section was complied with and the Corporation Commissioner of California by the issuance of the permit found the proposed plan of business to be fair, just and equitable.

The appellant William Jackson Shaw was neither an officer nor a director nor an official nor employee of Consolidated Mines of California.

Back in 1932 a committee was organized of various stockholders of the Monolith Portland Cement Company, for the purpose of propagating a suit against Coy Burnett, one of the officers of the Monolith Company, on the grounds of misrepresentation and misappropriation of funds [R. 133, 135, 136]. The appellant was an investigator for the committee [R. 136]. Members of the committee were Mr. Harding, Mr. Lagrange and Mr. Morgan. Through the efforts of this committee and appellant a recovery suit was started which resulted in a judgment of $820,000 [R. 159]. This money was distributed to the company but the stockholders were not satisfied to hold the Monolith stock because of the difficulties they had had.

Thereafter, Frank Tyler, a member of the Monolith Committee, who owned three mines in California known as the McKisson, Grand Prize and Mineral Lode, turned these miles into the Consolidated Mines of California in exchange for 450,000 shares of no par value stock of which 300,000 shares were to be placed in escrow, and 150,000 shares were issued to Mr. Tyler [R. 279, 280] as his personal stock.

Mr. Tyler also filed with the Corporation Commissioner of the State of California a partnership agreement which he had with various persons, and he was authorized to issue 20,000 shares to these persons out of his stock [R. 282, 283].

The Consolidated Mines of California, a California corporation, was operating a mine 21 miles east of Jackson, Calaveras County, California. It was incorporated for one million shares of no par value stock and 150,000 shares had been authorized for issuance with no treasury stock for sale.

The Corporation Commissioner granted a permit to sell and issue 150,000 shares of stock and to keep 300,000 shares in escrow [R. 281]. Of this 150,000 shares 60,000 were issued to Frank S. Tyler and the balance to various individuals who were members of the partnership with him, in accordance with their respective interests in the partnership. That partnership agreement recited that 40 per cent of the assets of the partnership would be owned by Mr. Tyler in consideration of certain things he was to turn over, and the other 60 per cent belonged to the partners who had subscribed their names at the foot of the document.

The appellant Shaw had an agreement with Tyler to receive 80 per cent interest in any and all net income to be realized from the consideration received by Tyler for the assistance rendered to Tyler by W. J. Shaw "in the formation of that certain mining partnership entered into between myself and sundry other individuals under

date of February 6, 1934, and for certain cash advances made to me for other considerations received" [R. ....].

The three stock certificates that are involved in counts 14, 15 and 16 of the indictment, according to the testimony of Louis R. Jacobson [R. 272, 273] all came from certificate No. 666 of Consolidated Mines of California. Certificate No. 666 was originally issued to J. R. McKiver, who received 10,000 shares of stock for a valuable consideration. McKiver issued 5,000 shares of this 10,000 shares to Frank S. Tyler by certificate No. 680. Certificate No. 680 was re-issued, 4,000 shares going back to Tyler by certificate No. 716. No. 716 was divided, and from it No. 732 was issued to Dr. Homer J. Arnold and Mrs. Arnold [R. 343]. Certificate No. 716 was divided further and issued to Regina Woodruff and Mr. and Mrs. J. C. Goodrich [R. 343, 344]. The Goodrich certificate was No. 740 for 18 shares. It was from the private stock of Tyler and was at no time any part of stock issued in the partnership agreement of Frank S. Tyler and associates. McKiver gave valuable and legally sufficient consideration, as shown by the corporation stock books and the certificate of the Corporation Commissioner of the State of California [R. 344]. It was therefore personally owned stock.

Statement of the Case.

The appellant William Jackson Shaw was indicted, according to the caption thereon, for alleged violation of Section 5(a) (2), Securities Act of 1933, as amended (Title 15, United States Code, Section 77q(a) (2) Section 37, Criminal Code (Title 18, United States Code, Section 88), Section 215, Criminal Code (Title 18, United States Code, Section 338), in the United States District Court, in and for the Southern District of California, Central Division, on December 13, 1939 [R. 2 *et seq.*] The indictment charged seventeen counts, but a demurrer to count 17 charging conspiracy was sustained and the appellant was tried on sixteen counts.

While the appellant was charged with violation of Title 15, United States Code, Section 77q(a) (2), as designated in the caption, counts 14, 15 anl 16 of the indictment do not charge any violation of this section, and what section they do charge a violation of is left to conjecture from the reading of the counts of the indictment itself.

The jury, after having heard all the facts, implicitly determined by its verdict of not guilt that in so far as counts 1 to 13 were concerned, all of the representations which were made were not in violation of the Statute and that appellant was not guilty of acting fraudulently or other than in perfectly good faith and honesty. The indictment in counts 14, 15 and 16 does not involve these issues, but the mere technical failure to file a registration statement before mailing the particular stocks which were involved in counts 14, 15 and 16, if the law requires such registration. It will be amply demonstrated that the law does not require such a registration under the particular facts of this case, but the mere causing of three letters

to be mailed without a registration statement of the company having been filed. The appellant not being either an officer or director or employee of the company itself had neither a right nor a duty to file such a statement if the law required it under the facts of this case. It will be amply demonstrated that the law does not require such a registration under the facts of this case.

A general and special demurrer was filed to the indictment [R. 77 *et seq.*] There was also filed with the appellant's demurrer a plea in abatement on the grounds that the appellant had been subpoenaed to appear before the Securities and Exchange Commission and had testified before that body, and that he was required and compelled to produce books, papers and other matters before said body, and he demanded that the indictment be quashed and the issue be tried before a jury on said plea in abatement.

The Government filed a demurrer to the plea in abatement [R. 88] and motion to strike the plea in abatement. On June 14, 1940, the Government's demurrer to the plea in abatement was sustained by the trial court, passing upon it without a jury, and the Government's motion to strike was granted. Defendant's demurrer as to all counts except count 17 was overruled. The case was set down for trial by jury on June 17, 1941, at which time the defendant, in custody, stated that he was not able to hire counsel because he is a pauper, and the Court thereupon appointed C. C. Montgomery, Esq., to represent the appellant [R. 105].

The trial thereupon proceeded from day to day on all sixteen counts in the indictment. On July 9, 1941, the jury returned its verdicts of not guilty on all counts

except counts 14, 15 and 16, which charged failure to file a registration statement with the Securities and Exchange Commission for Consolidated Mines of California, on which counts the defendant was found guilty [R. 107] *and sentenced to six months in jail* on each of the counts, running concurrently [R. 112, 113].

Notice of appeal was duly and regularly given, the appellant electing not to serve his sentence pending appeal [R. 114]. Motion for a new trial as to each of the counts of which he was convicted was denied, and exception noted [R. 110, 111].

Count 14 alleges that the appellant in Los Angeles County

> "knowingly, unlawfully, willfully and feloniously did cause to be delivered by the United States mails a certain security, to-wit: a certificate, No. 732, for 250 shares of the capital stock of the Consolidated Mines of California, a corporation, for the purpose of sale and for delivery after sale of said security to Dr. Homer J. Arnold and Florence R. Arnold, no registration statement being in effect as to such security and no exemption from registration being available, and said delivery by the United States mails was in the manner following to-wit:
>
> "Said defendants on or about December 21, 1936, caused to be delivered by the Post Office establishment of the United States according to the directions thereon a postpaid envelope addressed to Dr. Homer J. and Florence R. Arnold, 345 North Norton, Los Angeles, California, enclosing said security which said security was in the following tenor:"

Thereafter follows a copy of the stock certificate signed by H. L. Wikoff, president, Frank S. Tyler, secretary.

Count 15 charges that on or about June 3, 1937, at Los Angeles County, California, the appellant in Los Angeles County

> "did willfully, knowingly, unlawfully and feloniously cause to be delivered by the United States mails a certain security, to-wit: a certificate No. 741, for 30 shares of the capital stock of Consolidated Mines of California, a corporation, for the purpose of sale and delivery after sale of said security to Regina Woodruff, no registration statement being in effect as to such security and no exemption from registration being available, and said delivery by the United States mails was in the manner following to-wit:
>
> "Said defendant on or about June 3, 1937, caused to be delivered by the Post Office establishment of the United States according to the directions thereon, a postpaid envelope addressed to Mrs. Regina Woodruff, 802 North Vermont, Los Angeles, California, enclosing said security which said security was of the tenor following to-wit:"

Thereafter follows a copy of the stock certificate.

Count 16 charges that the appellant in Los Angeles County on June 8, 1937,

> "willfully, knowingly, unlawfully and feloniously did cause to be delivered by the United States mails a certain security, to-wit: a certificate No. 742 for 18 shares of the capital stock of Consolidated Mines of California, a corporation, for the purpose of sale and for delivery after sale of said security to J. C. and E. M. Goodrich no registration being in effect as to such security and no exemption from registration being available, and said delivery by the United States mails was in the manner following to-wit:

> "Said defendant on or about June 8, 1937, caused to be delivered by the Post Office establishment of the United States according to the directions thereon, a postpaid envelope addressed to Mr. J. C. and E. M. Goodrich, 4532 South Wilton Street, Los Angeles, California, enclosing said security which said security was of the tenor following to-wit:"

Thereafter follows the stock certificate.

It will be noted that each of these certificates was mailed from one address in Los Angeles to another in Los Angeles, in the same county and state. Each certificate was signed by Frank Tyler and also by the name of H. L. Wikoff.

The Monolith stock of Thomas J. Allen and Garfield Vogel were on deposit with the Pacific National Bank of San Francisco [R. 130, 162].

The evidence as to their transactions were offered as to the counts of which appellant was acquitted and cannot properly be considered as to the three counts now under attack on appeal.

With the exception of the few original committee members in the old Monolith or Midwest Company, all of the other committee members and persons lived in the State of California, and all of the other transactions were carried on within the state.

It is not claimed by the Government that there was any fraud, misrepresentation, or other wrongfulness in connection with the transactions on which the appellant was

convicted other than nonregistry with the Securities and Exchange Commission of the company. Nor is it claimed by the Government that there was not full, fair and proper disclosure of all the transactions to the proper authorities in the State of California, which disclosure to the state resulted in the issuance of a permit and the carrying on of the transactions within the state and the issuance of a permit to dispose of the stock as it was disposed of. It was appellant's contention that the stock which Tyler received not only in exchange for his mining properties and his advances but also in his dealings with McKiver became his personally owned stock by reason thereof and were not subject to the Securities and Exchange Act. The position taken by the trial court contrary to the opinion of this Court in *Consolidated Mines v. Securities Exchange Commission,* 97 F. (2d) 704, 707, was that it did not make any difference whether the stock was personally owned or not, if it was deposited in the mails without a registration statement in the Securities and Exchange Commission it was a violation of the law, and he so instructed the jury, thus removing from them the right to determine first, if it was personally owned stock, and if it was personally owned stock, if it was thereby exempt by reason of that fact.

Nowhere is it claimed by the Government that the appellant mailed the stock, but it is claimed that he *caused* it to be mailed. The evidence in this respect is challenged as insufficient.

The issues to be decided upon this appeal are these:

I.

(a) Where a corporation is duly and regularly organized under the laws of a state, and full and fair disclosure has been made of all the facts regarding the corporation to the state officials, and it is shown in the permit, to the satisfaction of the state authorities, that the transaction is fair, equitable and just to the investors, the said state authority being one authorized by law to investigate and pass upon the question and to receive full and fair disclosure and make it available to the public any time, is it a violation of the Securities Act of 1933 to use the mails in sending a letter from one place in Los Angeles to another place in Los Angeles without filing a registration statement with the Federal Securities and Exchange Commission?

(b) Where the purpose of Securities and Exchange Act is "to provide full and fair disclosure of the character of the securities sold in *interstate and foreign commerce and through the mails* and to prevent fraud in the sale thereof, and for other purposes, "is a prosecution of an individual who was neither an officer, director nor employee of a company for causing the mails to be used in **intrastate** commerce by sending stock of a state corporation duly and regularly authorized under the laws of the state, which has made a full and fair disclosure of the character of the securities sold within that state to the duly constituted authorities, authorized by the Federal Securities and Exchange Act?

(c) Is such an interpretation of the Act holding that it is a violation of the Securities and Exchange Act, an improper interpretation, since such interpretation has no reasonable relationship to the object sought by the Act?

II.

Where stock is personally owned and it is not charged that there is anything fraudulent or improper in the sale or dealings, does an act of Congress if construed to apply to the sale of such personally owned stock offend the Fifth Amendment to the Constitution of the United States holding that no person can be deprived of property without due process of law?

Does such statute impair the freedom of contract guaranteed by the Constitution?

Is such an act as construed and applied unconstitutional?

III.

Where a defendant is tried by a jury and one of the vital questions is whether he owned the stock personally, and if he did, that it would be exempt under the law, does the Court invade the province of the jury by instructing them that it is immaterial whether the stock is personally owned or not?

IV.

Where the stock generally is part of an issue sold only to persons resident within a single state or territory where the issuer of such security is a person resident and doing business within, or is a corporation incorporated by and doing business within such state or territory, is the sale of such security exempt under the act itself where the transactions which the accused is alleged to have had were all within the state and city, and where the only evidence of any other transactions is regarding isolated cases of persons who had been members of a stockholders' committee group which had had its stock in deposit within the state itself and where the transactions were finally consummated within the state?

V.

Where the only stock involved in the alleged violation was personally owned stock transferred from one owner to another and sold by the second owner, is such stock within the exemption of Section 3, Subd. 10?

VI.

Where this Court has previously held implicitly in a decision involving this company that personally owned stock is exempt is it the law of the case which the District Court is bound to follow?

VII.

Where the Court takes away from the jury the right to determine whether stock is personally owned and therefore exempt from the Securities and Exchange Act, is it an invasion of the province of the jury and reversible error?

VIII.

Where a plea in abatement is submitted to the Court and an issue of fact is raised as to whether immunity was granted by reason of the appearance by request of a person before the Securities and Exchange Commission, should the demurrer to the plea in abatement be overruled and the issue submitted for trial before a jury?

IX.

Where a person is neither an officer nor an employee of a company is the evidence sufficient to show that he caused a stock certificate to be mailed from one place in Los Angeles to another place in Los Angeles solely by reason of the fact that the certificates were mailed?

X.

Is the burden of proof upon the Government to show that the stock was not one of the exempt classifications, or can it shift that burden of proof to the defense, and is the burden of proof upon the Government to prove beyond a reasonable doubt that the defendant acted without innocent intent?

Assignment of Errors and Points Upon Which Appellant Relies in This Appeal.

I.

THE DISTRICT COURT ERRED IN OVERRULING THE DEMURRER TO THE INDICTMENT AND IN HOLDING THAT SAID INDICTMENT CHARGES A PUBLIC OFFENSE WHEN IT MERELY CHARGES CAUSING A LETTER TO BE MAILED CONTAINING STOCK OF A STATE CORPORATION DOING BUSINESS WITHIN THE STATE FROM ONE PLACE IN A COUNTY OF THE STATE TO ANOTHER PLACE IN THE SAME COUNTY.

II.

THE DISTRICT COURT ERRED IN HOLDING THAT WHERE THERE HAS BEEN FULL AND FAIR DISCLOSURE OF THE CHARACTER OF THE SECURITIES INVOLVED TO THE OFFICIALS OF THE STATE BY A STATE CORPORATION DOING ITS PRINCIPAL BUSINESS IN THAT STATE, AND THE ONLY TRANSACTIONS INVOLVED IN THE PARTICULAR CONVICTIONS WERE WITHIN A COUNTY OF THE STATE, THAT THE SECURITIES AND EXCHANGE ACT IS APPLICABLE TO THIS CASE.

III.

THE DISTRICT COURT ERRED IN HOLDING THAT THE SECURITIES AND EXCHANGE ACT APPLIES TO PERSONALLY OWNED STOCK AND IN DISREGARDING THE LAW OF THE CASE AND THIS COURT'S IMPLICIT HOLDING TO THE CONTRARY. SUCH CONSTRUCTION WOULD BE UNCONSTITUTIONAL, IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND WOULD ALSO IMPAIR THE FREEDOM OF CONTRACT.

IV.

THE DISTRICT COURT ERRED IN INVADING THE PROVINCE OF THE JURY AND IN INSTRUCTING THE JURY THAT IT IS IMMATERIAL WHETHER THE STOCK IS PERSONALLY OWNED OR NOT.

V.

THE DISTRICT COURT ERRED IN HOLDING THAT THERE WAS SUFFICIENT OR ANY EVIDENCE UPON THE FACE OF THE RECORD TO SHOW THAT APPELLANT CAUSED ANY STOCK CERTIFICATES TO BE MAILED.

VI.

THE DISTRICT COURT ERRED IN HOLDING THAT WHERE A STATE CORPORATION IS DOING BUSINESS WITHIN THE STATE AND THE TRANSACTIONS INVOLVED IN THIS CASE WERE ALL DONE WITHIN A COUNTY OF THE STATE, THAT THE PARTICULAR TRANSACTIONS WERE NOT EXEMPT UNDER THE SECURITIES AND EXCHANGE ACT.

THE EVIDENCE AFFIRMATIVELY SHOWS THAT THE STOCK TRANSACTION INVOLVED IN COUNTS XIV, XV AND XVI ARE WITHIN THE EXEMPTIONS FROM THE ACT, UNDER SECTION 77D THEREOF.

VII.

THE COURT ERRED IN ITS INSTRUCTIONS TO THE JURY.

VIII.

THE DISTRICT COURT ERRED IN SUSTAINING THE DEMURRER TO THE PLEA IN ABATEMENT AND IN GRANTING A MOTION TO STRIKE THE SAME.

IX.

THE COURT ERRED IN FAILING TO SUBMIT ISSUES PRESENTED BY THE PLEA IN ABATEMENT TO A TRIAL BY JURY.

I.

The Indictment Fails to State an Offense Against the Laws of the United States. The Demurrer to These Counts Should Have Been Sustained.

Here the indictment in counts 14, 15 and 16 alleges that the appellant caused a certificate of stock of a California corporation to be mailed from one place in Los Angeles county to another place in Los Angeles. The indictment therefore on its face alleges facts that show no crime was committed. For the act itself SPECIFICALLY eliminates any mailing of stock of a corporation organized in a state and doing business within that state.

The indictment contains an allegation of conclusion of the pleader that the stock is not exempt, but it contains no statement of fact to support such conclusion, and the only facts alleged are such as show that no offense was committed.

In *United States v. Cruickshank,* 92 U. S. 542, 23 L. Ed. 588, 593, 594, and in *U. S. v. El Paso & N. E. R. Co.,* 178 F. 846, it is stated that an indictment must allege facts—facts from which the court may determine if the indictment charges a crime, facts from which an accused may prepare his defense and plead once in jeopardy. Here the presumption of innocence clothes the defendant. The facts set up in the indictment of themselves must show if true that a crime has been committed, or the defendant is entitled to his discharge.

II.

The District Court Erred in Holding That Where There Has Been Full and Fair Disclosure of the Character of the Securities Involved to the Officials of the State by a State Corporation, Doing Its Principal Business in That State, and the Only Transactions Involved in the Particular Convictions Were Within a County of the State, That the Securities and Exchange Act Is Applicable to This Case.

In *People v. Schidtz,* 7 Cal. App. 330, at 374, it is said:

> "It is an elementary principle of criminal law that the indictment must show that a crime has been committed. 'In no case can the indictment be aided by imagination or presumption. The presumptions are all in favor of innocence, and if the facts stated may or may not constitute a crime, the presumption is that no crime is charged.' (People v. Terrill, 127 Cal. 100 (59 Pac. 836).)"

All the facts alleged in the indictment are lawful.

Electric Bond & Share Co. v. S. E. C., 92 F. (2d) 580, 586;

Peo. v. Terrill, 127 Cal. 100;

Peo. v. Schidtz, 7 Cal. App. 330, 374;

Peo. v. Davenport, 21 Cal. App. (2d) 292.

We will argue this point further as to whether the mailing of a certificate from one place in a county to another, if it occurred, is a violation of the act, under the points below.

The main object of the Securities Act of 1933, as expressed in its heading, is "to provide full and fair dis-

closure of the character of the securities sold." It is not to protect the mails from fraud, as is the purpose of the Mail Fraud statute, but to protect the public by full and fair disclosure of the character of the securities sold.

Where this is accomplished within the state, as required by the Securities Act of California, and where there has been full and fair disclosure of the character of the securities sold, it surely was not the intent of Congress to punish and jail a person for use of the mails within a state by a corporation within that state, whereas if some other instrumentality were used there would be no punishment whatever.

An examination of the heading of the act indicates that it was intended to protect *interstate and foreign commerce and the use of the mails in interstate and foreign commerce where there had been no full and fair disclosure of the character of the securities sold in interstate and foreign commerce and through the mails.*

The importance of the title and preamble to tell of the purpose and object of the act is shown by the following cases:

Neece v. Northern Pacific R. R. Co., 211 Fed. 254;
In re Firthman, 118 Cal. App. 332;
Blumenthal v. Larson, 79 Cal. App. 726;
Bettencourt v. Sheely, 157 Cal. 698;
Sharon v. Sharon, 75 Cal. 16.

In the case at bar there had been full and fair disclosure, not once, but three times. There had been three different permits issued by the Corporation Commissioner of the State of California, and no question is raised but that

there had been full and fair disclosure of the character of the securities sold.

It has been repeatedly said by the Supreme Court of the United States that the Government will not interfere in matters where the state itself takes care of them, matters that are purely intrastate, or largely so. California is quasi-sovereign. (*Lisenba v. California,* 86 L. Ed. 179, 190.) In the case of *Milk Wagon Drivers Union v. Meadomoor Dairies,* 85 L. Ed. 837, the United States Supreme Court again emphasized the importance of states being left alone in matters that are of concern within the state. We have in this case the finding of the Corporation Commissioner of California that there has been full and fair disclosure of Consolidated Mines of California. See, also:

Hysler v. Florida, 86 L. Ed. 584.

The act of Congress in connection with securities was intended as a policing measure, that is to say, it was within the police power of Congress in its supervision over securities in interstate commerce. It was not intended as a policing measure over the mails, because if it were it would throw every local security within the policing power of Congress, and certainly this was never intended. Nor does the headnote of the act show such intent.

The policing power in this case is certainly no greater than that which is necessary. Where, within a state, a corporation and its officials have complied with every requirement of full and fair disclosure, the police power of Congress was not intended to apply to purely local transactions in which the mails might have incidently been used, especially by an individual who was neither an officer nor employee of the company.

In *Electric Bond and Share Co. v. Securities and Exchange Comm.*, 92 Fed. (2d) 580, at 586, it is said:

> "Congress has long exercised, and the courts have sustained, the federal power to prevent the facilities of interstate commerce and the mails from being used to accomplish ends inimical to the general welfare. This legislation is concerned with the power of the federal government to control in the public interest the flow of commerce and intercourse through these channels; but not to the extent that the government may impose a collateral obligation upon the person responsible for the flow. The latter question depends upon the particular relationship of the obligation to, and its influence upon, that flow. Carter v. Carter Coal Co., 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160; Board of Trade etc. v. Olsen, 262 U. S. 1, 43 S. Ct. 470, 67 L. Ed. 839; Stafford v. Wallace, 258 U. S. 495, 42 S. Ct. 397, 66 L. Ed. 735, 23 A. L. R. 229; United States v. Ferger, 250 U. S. 199, 39 S. Ct. 445, 63 L. Ed. 936. Such questions may arise when the validity of other portions of the Act is presented to a court, but are not here involved in the consideration of the registration provisions because these sections are directly confined to certain regulations of the use of the channels of interstate commerce and the use of the mail facilities. No holding company need register unless it makes specified uses of the mails and instrumentalities of interstate commerce. *A holding company whose interests and business are predominantly intrastate need not register even though it makes use of the mails* and the channels of interstate commerce." (Italics ours.)

It will thus be seen that the purpose of the Securities and Exchange Act is to regulate the flow of securities in interstate commerce and the use of the mail facilities in

that respect, and that a company whose business is predominantly intrastate need not register even though it makes use of the mails.

While the *Electric Bond and Share Company* case involved that of a holding company, which enactment was an amendment to the original Securities Act of 1933, it is held in the Circuit Court opinion that "a holding company whose interests and business are predominantly intrastate need not register even though it makes use of the mails and the channels of interstate commerce."

We have repeated this language, which we have heretofore quoted, because it fits the particular case at bar.

The three transactions of which appellant was convicted were not only merely intrastate but they were transactions from one point in the City of Los Angeles to another point in the City of Los Angeles of personally owned stock. The business of the corporation itself was and is predominantly intrastate. The corporation is a California corporation and all of its transactions, with the exception of involving isolated Oregon committeemen, were California transactions.

The evidence as to these few transactions was introduced into the case by the Government primarily to prosecute and convict the defendant with relation to other counts in the indictment of which he was acquitted. The testimony of those witnesses cannot therefore properly be considered at all with relation to the three counts of which he has been convicted. It has long been construed by the courts that each count in an indictment must be consid-

ered as though it was a separate indictment, because obviously, if the evidence had been introduced on that count in a separate trial it would have no value in this trial.

Dunn v. United States, 284 U. S. 390.

Returning now to the power of Congress in passing the Securities and Exchange Act, the Congress of the United States must be deemed to have acted with no desire to invade the reservations of the Tenth Amendment to the Constitution of the United States, which reserves to the states all powers not specifically granted to Congress.

It was not the intention of the enactors of this law to provide police regulations relating to the internal trade and affairs of a state nor with small corporations within the state nor with individual transactions. "This," said the United States Supreme Court in *United States v. Dewitt,* 9 Wall. 41, 19 L. Ed. 593, 594, "has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion." (See *Keller v. United States,* 213 U. S. 138, 144-146, 53 L. Ed. 737, 740; *Cooley, Constitutional Limitations,* 7th Ed., p. 11.)

Our federal government is one of enumerated powers. (*McCulloch v. Md.,* 4 Wheat. 316, 4 L. Ed. 579.) A statute must be construed according to its natural and reasonable effect. (*Collins v. N. H.,* 171 U. S. 30, 43 L. Ed. 60, 62.) The powers not expressly delegated to the

national government are reserved to the states. (*Lane County v. Ore.*, 7 Wall. 71, 19 L. Ed. 101.)

An examination of the statute shows that it was the intent of Congress that the principal object of the statute should be to control interstate and foreign commerce and the use of the mails generally in that respect. The statute itself defines interstate commerce in section 2, subdivision 7, as follows:

> "(7) The term 'interstate commerce' means trade or commerce in securities or any transportation or communication relating thereto among the several States or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia."

Sections 3 and 4 of the statute list a large number of exemptions from the act. Section 3, subdivision 11, provides as follows:

> "(11) Any security which is a part of an issue sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within or if a corporation, incorporated by and doing business within, such State or Territory."

The act also gives full powers to the S. E. C. to exempt other securities not necessary to come under the act in the public interest.

The act itself, therefore, shows the intent of the Congress to exempt from its provisions, and they are so exempted, "any security which is part of an issue sold only to persons resident within a single state where the issuer of such security is a person resident and doing business within, or has a corporation in and incorporated by and doing business within such state," and subdivision (b) gives the Commission specific authority to exempt securities "if it is not necessary in the public interest to require a registration statement."

Surely the nature of the particular transactions of which this appellant was convicted, and for which he was sentenced to six months in jail on each count, although the company had fully and fairly made public all the facts regarding the corporation within the state, is not of such a nature as was intended to come within the scope of the Securities and Exchange Act, and was exempt within the provisions of the act relating to intrastate transactions, and personally owned transactions.

III.

Where Stock Is Personally Owned and It Is Not Charged That There Is Anything Fraudulent or Improper in the Sale or Dealings, an Act of Congress, if Construed to Apply to the Sale of Such Personally Owned Stock, Would Offend the Fifth Amendment to the Constitution of the United States, Holding That No Person Can Be Deprived of Property Without Due Process of Law.

The evidence in this case shows that Frank S. Tyler received his principal stock in exchange for the mines and certain advances that he made for the corporation. It therefore became personally owned stock. One certificate came to him through a different transaction. This stock came from J. R. McKiver, which is reflected in certificate No. 666 issued to McKiver for his mining properties. He owned a mine and it was a part of the consideration in the permit of the Corporation Commissioner that McKiver receive 10,000 shares of stock in payment for his mine.

McKiver then reissued 5,000 shares of the 10,000 shares by certificate No. 680 to Frank S. Tyler. Certificate No. 680 was reissued, 4,000 shares going to Tyler by certificate No. 716. No. 716 was divided and from that certificate, certificate No. 732 was issued to Dr. Homer J. and Mrs. Arnold [R. 272-273, 343].

As such personally owned stock Tyler was entitled to transfer it freely and it was not within the regulatory power or purpose of the Securities and Exchange Act. If it were construed to be within the power, purpose and scope of the act, as thus construed and applied, the act would be unconstitutional as offending the Fifth Amendment, which gives the right to a person to use and dispose of his personal property as he sees fit and places no restriction upon such personally owned property. If it did

so, it would be unconstitutional. (*People v. Pace,* 73 Cal. App. 548; *People v. Davenport,* 21 Cal. App. (2d) 292; *Billings v. Hall,* 7 Cal. 1, 6; *Ex parte Quarg,* 149 Cal. 79; *Cooley's Statutory Rights,* p. 68.)

This Court has inferentially held this to be the law of this case in the case of *Consolidated Mines of Calif. v. Securities and Exchange Comm.,* 79 F. (2d) 704, 707. That case challenged the right of the Securities and Exchange Commission to order subpoenaed and brought in the books of the company, due to the various transactions which were under investigation. It was asserted that the stock did not come within the review of the Securities and Exchange Commission, because it was personally owned stock. This Court held that it was the right of the Commission to examine into the stock to see if it was personally owned stock, and that if it was personally owned stock, it did not come within the prohibition of the Federal Securities Act. This being the law of the case the trial court was bound to follow it, but did not.

But if it be assumed that the Congress in passing the act had the Fifth Amendment in mind, and that it passed the act in the light of that amendment, then it must be assumed that Congress did not intend to restrict the sale and distribution of personally owned stock, which would be a limitation upon an individual's right to do business under the Constitution, and would impair the freedom of that person's contract guaranteed by the Constitution. If the act is thus construed and applied, then no violation of the statute could have taken place in the mailing of three personally owned stock certificates from one point in Los Angeles to another point in Los Angeles.

People v. Pace, 73 Cal. App. 548;
People v. Davenport, 21 Cal. App. (2d) 292.

IV.

Where a Defendant Is Tried by a Jury and One of the Vital Questions to Be Determined Is Whether He Owned the Stock Personally, and if He Did, That It Would Be Exempt Under the Law, the Trial Court Invades the Province of the Jury When It Instructs Them That It Is Immaterial Whether the Stock Is Personally Owned or Not.

The trial court instructed the jury as follows:

> "The fact that the stock sold was or was not personally owned stock is immaterial so far as the Federal Securities Act is concerned."

The act itself, as we construe it, exempts personally owned stock. (Section 4, subd. 1.) It exempts "transactions by any person other than an issuer, underwriter or dealer," and further says, "The term 'issuer' means every person who issues or proposes to issue any security." (Sec. 2, subd. 4.)

The stock (with the exceptions above mentioned to which this discussion has no application) which had been issued to Tyler was issued to him in exchange for property and became his personally owned stock. He was not an issuer within the meaning of the act. Even if the trial court were to view Tyler as an issuer, it was for the jury to determine whether under the act he was or was not an issuer. The jury became the sole determiner of the facts in the case. (Article III, sections 2 and 6, and the Sixth and Seventh Amendments to the United States Constitution, which preserve inviolate the right of trial by jury.)

It was the jury's duty and the defendant's right to have the jury determine whether the stock was personally owned, and if so, whether this placed the stock within the exemption of this provision of the statute. The Court's instruction with reference thereto was therefore erroneous.

V.

The Securities and Exchange Act Shows an Intent to Provide a Different Regulation for the Use of the Mails Than for Interstate and Foreign Commerce.

If the Securities and Exchange Act is given the constructions which would sustain this judgment, then it means that a different rule would apply to the use of the mails from one place in Los Angeles to another in Los Angeles than to interstate and foreign commerce. Thus a local corporation which might send stock from its office in a city to another point in that city would be in violation of the act, because the mails were used, whereas another corporation which used local messenger service or an express company, or other agency in the state, would not be in violation of the act. One would have to register because it dropped a letter in the mails, and another would not have to register because a different agency was used. Such a holding would put a strained construction on the act and would place unnecessary burden upon the Securities and Exchange Commission and upon local corporations using the mails. It would also be detrimental to the Post Office Department, for it would cause a lack of use of the mails in innocent business transactions—and might very well be helpful to telegraph and express companies which do not come under the ban of this particular statute unless the transaction is in interstate commerce.

That this was not the purpose of the act is shown in *Electric Bond and Share Co. v. S. E. C.*, 92 F. (2d) 580.

VI.

The Evidence Is Insufficient to Support the Charges Set Forth in Counts 14, 15 and 16. It Affirmatively Establishes Exemptions Under Section 77d of the Act of 1933, as to the Transactions Charged in These Counts.

Section 77d reads in part:

> "The provisions of Section 77e shall not apply to any of the following transactions:
>
> "(1) Transactions by any person *other than an issuer, underwriter, or dealer;* transactions by an issuer not involving any public offering;" (Italics added.)

The certificates issued to Dr. and Mrs. Arnold and the Goodriches were exempt from the requirement of Section 77e, the violation of which section counts 14, 15 and 16 charge.

The only evidence which the record contains to show the origin of the stock certificates issued to Dr. Arnold, Regina Woodruff and the Goodriches is the testimony of Louis R. Jacobson, the certified public accountant and Government witness. He was called by the Government and undoubtedly was qualified both as an expert and by reason of his knowledge of the business affairs of the corporations involved.

Jacobson was employed by Shaw and he set up the accounting system and built up the records of the financial transactions which form the basis of the case [R. 272-273]. Jacobson testified at great length and in detail, among other things, as to amounts advanced by Shaw and Frank S. Tyler.

It appears that there had been three permits issued by the California Corporation Commission to the Consoli-

dated Mines. The last one allowed the issuance of 10,000 shares of stock to J. R. McKiver, which is reflected in certificate No. 666 issued to J. R. McKiver and is thus an original issue; 5,000 shares of the 10,000 were reissued to Tyler by certificate No. 680; No. 680 was reissued, 4,000 shares going back to Tyler by certificate No. 716. No. 716 was divided and from it certificate No. 732 was issued to the Arnolds [R. 343].

Government witness Jacobson also traced the certificates issued to Regina Woodruff and the Goodriches back to the same certificate, to-wit, No. 716, and he said this certificate represented private stock as distinguished from company-owned treasury stock [R. 343, 344]. We quote the witness' exact language, as follows:

> "The Woodruff certificate No. 741 is for 30 shares of stock issued to Regina Woodruff on May 13, 1937, and that was transferred from Frank S. Tyler certificate dated August 26, 1937, on certificate No. 716 originally for 4,000 shares. August 26, 1937—that was beyond my time.
>
> "Goodrich, 740, 18 shares, that is the same transaction. It goes back to certificate 716, and then back, and comes from the private stock. . . ."

That McKiver gave valuable and legally sufficient consideration for the 10,000 shares represented by certificate No. 666 is shown by the corporation's stock books and the certificate of the Corporation Commission [R. 344]. This certificate, therefore, goes back to permit No. 3 of the Corporation Commission issued to Consolidated Mines of California out of the stock authorized to be issued to Mr. Tyler and persons in partnership with him [p. 282].

The Government Having Produced Him Is Bound by His Testimony.

The trial judge told the jury:

> "Where the permit authorizes the giving of stock for something, the Government cannot go behind and say that is too much money . . . It is a matter of law I will give you later, the amount of stock Mr. Tyler was given by the corporation. There is no restriction as to who he could sell it to."

The statement has especial application to the McKiver stock and to the same stock after its transfer to Tyler and his ownership thereof.

Other portions of the testimony of the accountant, Jacobson, are to the same effect and consistently establish that all of Tyler's stock was his own privately owned stock, and Section 77d expressly exempts the owner of securities from the registration requirements of the Security Act.

It is also so held in *Rudnick v. Bischoff,* 17 N. Y. S. (2d) 575.

There Is No Proof That Appellant Caused Any Mailing.

There is no evidence in the case that the appellant Shaw, neither an officer nor employee, caused to be mailed the certificates in question.

As to count 14, Dr. Arnold testified that he had talked to Shaw about the mine. He said:

> "The first I had heard of it was when Mr. Morgan (chairman of the Monolith stockholders' committee [R. 399]), got my name, evidently from the committee list, and called about this transfer that some

of them were making, but I didn't talk with him any further. Then the next time I saw Mr. Shaw I spoke to him about it. He said he was keeping me in mind but he was waiting until things got a little further along before he said anything to me about it.

"Mr. Morgan called me on the telephone. The time I discussed this with Mr. Shaw was some weeks or a few months prior to the month of December, 1936. I think that was when I got my stock." [R. 473.]

Count 15 relates to the transaction of Regina Woodruff of 802 North Vermont, Los Angeles, California. Her testimony was as follows:

"Q. Now, this certificate which is photographed in the indictment, No. 741, for 30 shares is dated the 13th of May, 1937, and did that come to you through the United States mails, Miss Woodruff?

A. It did."

Prior to receiving this I had had a transaction with the Consolidated Mines of California. I talked with someone who was there and said he was Mr. Shaw. That was by telephone. I called up the office and asked for Mr. Tyler. Most of the letters which I had received had been from Mr. Tyler, and I had called once or twice before and I asked for information and had talked with Mr. Tyler. I asked for Mr. Tyler and was told that he was no longer in the office, but that I might talk with Mr. Shaw, and that was the first time that I even knew that Mr. Shaw was connected with the thing at all. I hadn't had any information in regard to the Consolidated Mines for some time, and I wanted to know what was being done, and why, and just what progress was being made, and he

assured me that everything was fine and that he was working without salary and he was hoping that the thing would be paying very, very soon because he wanted to be drawing a salary, and that he was quite sure that it would be paying us dividends and we would get our money back within a reasonable length of time; and he wanted me to convert my Midwestern stock into the Consolidated Mines, and he offered me—I had 30 shares of Midwestern, Monolith Midwestern,—and he offered me 60 shares for it. I think that is the substance of it.

I had a certificate for 30 shares of Monolith Midwestern stock, and Mr. Shaw's offer was to give me 60 shares of this Consolidated Mines for that. I sent it in and I received through the mails this certificate and I immediately called the office again and at that time I asked for Mr. Shaw and said that I had been told that I would receive 60 shares and had received only 30, and he said, "Well, that was a very serious mistake," and he would see that I got the other 30, which I did.

The Eva M. Goodrich transaction is the basis of the charge made in count 16.

All that we know about how that transaction was conducted appears in the record, pages 265 to 269, inclusive.

The name of William J. Shaw is not therein mentioned.

Upon what theory the jury or the Court surmised that Shaw had anything to do with the transportation of the stock certificate to Eva M. Goodrich is difficult to even guess. It would have been impossible to do more than surmise that he took some part in the matter because there is no evidence on the subject.

As to the other two counts it appears that Mr. Shaw arranged the terms of the transactions, but the record

does not supply any competent proof or any fact which tends to establish who mailed the certificates or caused either to be mailed.

Regina Woodruff testified that she had received letters from Mr. Tyler and she called on the telephone and asked for him, but was told that he was no longer there, but that she might talk with Mr. Shaw. The witness stated that she had not heard about Consolidated Mines for some time and said, "I wanted to know what was being done, and why, and just what progress was being made"; she told the jury of a conversation about the mine and said "he" offered 30 shares of Consolidated stock for her 30 shares of Midwestern, Monolith.

It may be assumed that she accepted the proposition because she said she sent her stock in and received back through the mail a certificate for 30 shares. Thereupon she called the office, asked for Mr. Shaw, said she was to receive 60 shares and had only received 30 and was told that a serious mistake had been made and that the speaker would see that she got the other 30 shares, and thereafter, so the witness said, she "got another 30." [R. pp. 119-121.]

This witness did not testify that the person to whom she talked on the telephone was Mr. Shaw; she did not say she had ever seen Mr. Shaw, either before this telephonic transaction, during it or afterward; she did not claim to know Mr. Shaw's voice or assert that the voice which she heard over the phone on the two occasions mentioned by her was the voice of this appellant. She neither attempted to identify the voice or the person who spoke to her.

Regina Woodruff merely related the facts as she knew them and did not attempt to draw any conclusions therefrom.

Appellant contends that the facts so related do not legally permit of the inference that the person with whom the witness conversed was the defendant William J. Shaw. Apparently the witness was not asked whether she knew the defendant Shaw's voice. She was not asked by any form of question to identify the voice which she heard over the telephone. Had any question calling for her conclusion in that regard been asked it would have been objectionable in that no foundation whatever had been laid.

It seems obvious that the same lack of foundation exists and prohibits the inference that it was William J. Shaw who talked to Regina Woodruff on both of the occasions concerning which she testified.

It is of the essence of the offense to show that Shaw caused each of the stocks to be mailed, and this must be shown by competent evidence.

Shaw was neither an officer nor a director of the Consolidated Mines. In *Freeman v. United States,* 20 Fed. (2d) 748, 750, the Court said:

> "The basic element of the offense is the placing of a letter in the United States mail for the purpose of executing such scheme. That is what makes it a federal offense. It is defined in the statute, must be alleged in the indictment, and must be proved. How? The Government says that it may be proved by the presumption arising from the postmark, 22 Corpus Juris 99, or, under the general rule that a postmark is *prima facie* evidence, that the envelope had been mailed, 21 R. C. L. 763; United States v.

Noelke (C. C.), 1 F. 426. That, concededly, is the rule in civil cases; but it leaves unanswered the question—vital in criminal cases—who mailed it? The statute imputes the crime to 'whoever . . . shall . . . place or cause to be placed any letter in the mails, . . .' and the indictment here charged that the three defendants did that thing. That charge, we hold, must be proved by evidence. The evidence need not be direct; that is, it need not be that the defendants were seen mailing the letter; it may be circumstantial, that is, evidence of the acts or doings, or business custom of the defendants, from which their act of mailing or their act which caused the letter to be mailed may reasonably and lawfully be inferred. . . .

"No case has been called to our attention and none has been discovered by our independent research where conviction has been sustained when there is no evidence, direct or circumstantial, that the accused mailed the letter. In the case at bar there is ample evidence of the receipt of the three letters through the mail, but the only circumstance that connects Freeman with mailing them, or any of them, is that the enclosures bore his signature and that a month or more before the letters were received Freeman had, in one instance, been asked for a statement of his company. The date of the request is too remote from the date of the receipt of the letter to connect the two. Moreover, we think the fact that Freeman signed the statement is not proof that he mailed it. As to Rosin and Paskow, there is no evidence connecting them with mailing the statement other than it was written on their company's stationery and enclosed in the company's envelope.

> "On this issue, we are constrained to reverse the judgment as to the three defendants and direct that they be given a new trial in harmony with this opinion."

In the case at bar the evidence is much weaker than in the *Freeman* case. Just as in the *Freeman* case there is ample evidence of the receipt of the three letters through the mail, so in the case there is ample evidence of the receipt of the three stock certificates through the mail. In the *Freeman* case, Freeman's name was signed on the enclosures in the letter. The Court there held that even though Freeman signed the statements, that was not proof that he mailed them. In the case at bar there is no evidence to show that Shaw signed any letter or certificate or that he mailed the stock certificates or directed anyone to mail them to Dr. Arnold, Mrs. Woodruff or Mrs. Goodrich, or that it was the custom of the company for Shaw to direct or cause the certificates to be mailed. In fact Mrs. Woodruff testified that most of her transactions were done with Tyler, the secretary, and that she generally communicated with him.

Dr. Arnold was Shaw's personal physician, and most of Arnold's conversations were with Shaw, but there is no showing that Shaw caused the stock certificates to be mailed to Dr. Arnold. In fact there is no reason why Shaw would not have personally taken the certificate to Dr. Arnold, who was treating him all the time (Shaw being a diabetic who was under physicians' care) and the mailing of the certificate must have been caused by some other person.

Mrs. Woodruff did not know Mr. Shaw, had never talked to him, and had no knowledge of who mailed the certificate to her.

Mrs. Goodrich received a stock certificate signed by Frank S. Tyler. The evidence does not show who sent it, or how it came to her, or that she ever knew or heard of Shaw.

Under this state of the record it is respectfully submitted that the evidence is entirely insufficient to show that the appellant Shaw caused the certificates to be mailed.

In the *Freeman* case the letter showed that the enclosures bore Freeman's signature. In the present case none of the letters bore Shaw's signature and the stock certificates were all signed by Frank S. Tyler. The fair inference from this is that Shaw did not cause the certificates to be mailed, under the *Freeman* case it would not be an inference that even the signer of the enclosures had caused the certificates to be mailed. To attempt to connect Shaw with the mailing of the letters it would be necessary for this Court to build an inference upon an inference. It would have to be inferred, although there is no evidence to support it, that Tyler or someone else caused someone to mail the letters, and it would then have to be inferred that Shaw caused Tyler to cause someone to mail the letters. There is no evidence to support such inference upon inference, nor is it legally permissible. (*Brady v. United States*, 24 Fed. 399, 403.)

In *Rosenberg v. United States*, 120 Fed. (2d) 935, 936, it is held:

> "The crime charged in the indictment has its genesis in the scheme to defraud, but the very gist and crux of the offense is the use of the mails in furtherance of the scheme. It is the use of the mails for that purpose which vests a federal court with jurisdiction of the offense. Direct proof that the

letter or other matter described in the indictment in a case of this kind was transmitted through the mails is not necessary. That fact, like many others, may be established by circumstantial evidence. Freeman v. United States, 3 Cir., 20 F. 2d 748; Brady v. United States, 8 Cir., 24 F. 2d 399, certorari denied, 278 U. S. 603, 49 S. Ct. 10, 73 L. Ed. 531; United States v. Baker, 2 Cir., 50 F. 2d 122; Cohen v. United States, 3 Cir., 50 F. 2d 819; Berliner v. United States, 3 Cir., 41 F. 2d 221; Davis v. United States, 3 Cir., 63 F. 2d 545; Mackett v. United States, 7 Cir., 90 F. 2d 462; Whealton v. United States, 3 Cir., 113 F. 2d 710. But an inference of fact which is essential to the establishment of the offense cannot be rested upon another inference. Conviction cannot be predicated upon one inference pyramided upon another. Presumption cannot be superimposed upon presumption and thus reach the ultimate conclusion of guilt. United States v. Ross, 92 U. S. 281, 23 L. Ed. 707; Vernon v. United States, 8 Cir., 146 F. 121; Brady v. United States, *supra*; Mackett v. United States, *supra*."

Plain error is shown on the face of the record.

While no exception was noted to the evidence as to counts 14, 15 and 16, an examination of the testimony of the witnesses relating to those transactions shows the insufficiency of the evidence on its face, and plain error, of which this Court will take notice.

Hannon v. United States, 9 F. (2d) 933;
McAffee v. United States, 105 F. (2d) 21;
Benson v. United States, 112 F. (2d) 422;
Troutman v. United States, 100 F. (2d) 628;
Lewis v. United States, 92 F. (2d) 952.

The Stocks Were Not a Transaction by Any Issuer, Underwriter or Dealer. There Was no Public Offering.

The District Court erred in holding that the transactions in each of the counts were not exempt under Section 77(d) of the act (sec. 4(1)), which provides exemptions for "transactions by any person other than an issuer, underwriter or dealer; transactions by an issuer not involving any public offering."

The three stock certificates were not transactions by any issuer, underwriter or dealer. They had been sold to McKiver, who in turn had sold the same to Tyler, and Tyler had split up the certificates as to each certificate involved in counts 14, 15 and 16. Under no construction, therefore, could the stock sent to Dr. Arnold and Mrs. Arnold, Regina Woodruff and Mr. and Mrs. Goodrich be considered as "a public offering."

In *Dunn v. United States,* 284 U. S. 390, 70 L. Ed. 356, it is held that each count in an indictment is regarded as if it was a separate indictment, and where separate evidence is presented as to each count that evidence alone can be considered.

Nor Was There a Public Offering.

In *Securities and Exchange Comm. v. Sunbeam Gold Mining Co.,* 95 F. (2d) 699, it was held that where a company was issuing securities pursuant to a plan which had been agreed to between it and another company, and letters were sent out to various stockholders regarding a proposed merger, and where the transaction was solely between the merged companies and the stockholders, there was no public offering.

VIII.

The Trial Court Erred in Instructing the Jury.

The defendant Shaw excepted to one instruction given to the jury which especially pertained to counts 14, 15 and 16 [R. p. 573]. This instruction reads:

> "The Section of the Act which the defendant Shaw is charged with violating is Section 5(a)(2), which reads as follows:
>
> " 'Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> " '(2) To carry or cause to be carried through the mails or in interstate commerce, by any means of instruments of transportation, any such security for the purpose of sale or for delivery after sale.'
>
> "In determining whether or not there has been a willful violation of this Section, as alleged in Counts 14, 15 and 16, you must determine whether or not there was a registration statement in effect as to the shares of stock of Consolidated Mines of California, whether or not such securities were actually sold to the witnesses Goodrich, Arnold and Woodruff, or any of them, and you must further determine whether or not the defendant Shaw caused any of such securities of the Consolidated Mines of California to be carried through the mails for sale or for delivery after sale.
>
> "The burden of showing an exemption from registration, if exemption is claimed, rests on the defendant. *The fact that the stock sold was or was not personally owned stock is immaterial so far as the Federal Securities Act is concerned.*" (Italics ours.)

Undoubtedly Section 77e covers these transactions, but by Section 77d they are expressly exempted from the provisions of the first named section. Section 77a reads:

> "The provisions of Section 77e shall not apply to any of the following transactions:
>
> "(1) Transactions by any person other than an issuer, underwriter or dealer."

In each of the transactions now under consideration Frank S. Tyler was the seller of his own stock and the buyer was neither an "issuer, underwriter nor dealer." It surely cannot be said that one who owns corporate stock and sells it can be regarded as an underwriter or dealer in disposing of such stock.

It appears to have been the theory of the Government that in Tyler's transactions involved in counts 14, 15 and 16 he was an underwriter. This contention is based upon Section 77b, par. 11 of the Security Act and the definition there given of the word "underwriter." This paragraph reads:

> "(11) The term 'underwriter' means any person who has purchased from an issuer with a view to, or sells for an insurer in connection with, the distribution of any security or participates or has a direct or participates or has a participation in the direct or indirect participation in any such undertaking or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term 'issuer' shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer."

But even this unusual definition of the "underwriter" does not fit the case of Frank S. Tyler and his relation to certificate No. 716 from which the three certificates involved in counts 14, 15 and 16 were carved. Tyler did not purchase certificate No. 680 from the "issuer."

It will be remembered that the original issue for which the corporation received value and which was authorized by the Corporation Commissioner of California, was certificate No. 666 issued to J. R. McKiver. This was McKiver's personal stock and the certificate represented 10,000 shares.

Thereafter Frank S. Tyler purchased 5,000 shares of this 10,000 shares from McKiver, which 5,000 shares were issued to Tyler by certificate No. 680; Tyler then divided this certificate and received back 4,000 shares represented by certificate No. 716.

As far as certificate No. 680 is concerned it was not only Tyler's personal stock but *he did not purchase it from the issuer;* nor did he sell it for the issuer.

Without making an analysis of paragraph 11 and showing that it does not, by any provision, encompass Tyler's transaction with respect to certificate No. 680 or portions thereof, suffice it to say that there is no evidence which tends to show that Tyler controlled the corporation issuer or that it controlled him in dealing with this stock, or which would otherwise bring Tyler within the purview of Section 2, paragraph 11.

It follows, therefore, that the instruction to which exception was taken was erroneous.

It is not the law that the fact that the stock sold was or was not personally owned stock "is immaterial" as far as the Federal Securities Act is concerned, because, although that single fact may not in all cases be con-

trolling, it is relevant and material in determining whether the transaction involved a sale by the "issuer, underwriter or dealer." This results from the fact that the general rule, under Sections 77d and 2 paragraph 11, leaves the owner of stock, who did not purchase it from the actual issuer, exempt from the requirements of Section 77e.

Without some competent evidence that the appellant was that person there is no proof whatever to in any way connect him with the Regina Woodruff transaction or the offense alleged in count 15 and there is certainly not one iota of evidence to show that appellant had anything to do with the *mailing* to her of the certificate.

Count 16 is the Dr. and Mrs. Arnold count. If this count were divorced from all the others (and legally it is a separate charge), and if the story of Dr. Arnold in which the transaction is described be read and considered alone, it would not make business sense; that is to say, the transaction was not business-like; rather, it was a friendly matter in which Shaw, the business man, sought to satisfy the request of his professional non-business friend and mildly encouraged the latter's expressed desire.

According to Dr. Arnold it was Morgan who first mentioned the mine to him. After that and after Arnold had sold Midwest stock for $480, on one of the occasions when Dr. Arnold saw Shaw as a patient the doctor spoke to Shaw about putting that money into the Consolidated Mines [R. p. 122]. Shaw told him it was not a big mine but ought to turn out a reasonable profit [R. p. 124]. Dr. Arnold proposed that Shaw take 250 shares and pay $420 in cash and $80 in treatments to Shaw for the stock, which Shaw accepted [pp. 122-124].

Dr. Arnold did not tell the Court to whom he paid $420. He rendered professional services to Shaw, but

the record shows that the stock which he received came from a certificate owned by Tyler, to-wit, certificate No. 716. Certain facts which the record does not show would be enlightening, for example, in determining whether the stock which the doctor received was Tyler's or Shaw's.

But appellant maintains that this is not material; that such evidence as the record contains reflects Shaw acting without compensation from anyone and in the capacity of a friend to the owner of the stock, his brother-in-law, and also as a friend to the purchaser, his physician, arranging a deal which both buyer and seller desired.

Shaw was neither issuer, underwriter nor dealer.

Otherwise stated the Tyler stock which is involved in counts 14, 15 and 16 is exempt from registration with the Commission as provided in Section 77e(1), because as to it Tyler qualified for exemption under Section 77d as personal owner and not the issuer, underwriter or dealer, (2) and he is not within the definition of an underwriter as that term is defined in Section 77b, paragraph 11, because he, Tyler, did not purchase this particular stock from the issuer, but obtained it from McKiver who personally owned it.

Thus it is demonstrated that the fact of personal ownership by the seller is one essential element in Tyler's exemption from the purview of Section 77e, the other fact being that his predecessor in interest owned the same shares personally.

This Court has inferentially held in *Consolidated Mines v. Security and Exchange Comm.*, 97 F. (2d) 704, that if the stock in question is personally owned stock it would not come within the prohibitions or sanctions of the Securities and Exchange Act and therefore established the law of the case. The Court said:

"They say, however, that the sales were made by appellant Tyler of his personally owned stock independently of the company. The Commission had substantial evidence to the contrary. This soliciting sales or encouraging purchases were written on the stationery of the corporation, and in some instances the signers designated themselves as corporate officers. The proceeds of the securities sold were in part loaned or contributed to the corporation and were used to keep the properties in operation, thereby enabling more stock sales to be effected. *Certainly the facts in possession of the Commission justified an investigation to determine whether the sales were in truth the individual transactions of Tyler or were made on behalf or at the behest of the corporation.*" (Italics ours.)

This Court therefore implicitly holds that if the stock was the personally owned stock of Tyler it would not come within the sanctions of the act.

This Court held that if the transactions were individual transactions of the secretary of the corporation that it would not be necessary to investigate the matter, and inferentially held that the Commission would not have any right to investigate the matter, which raised a substantial issue of fact. The same issue was presented to the jury in the trial. The Court decided the fact and did not leave it to the jury.

The decision of this Court in *Consolidated Mines v. Security and Exchange Comm.,* 97 F. 704, was handed down as the law of the case and should have been followed by the trial court in submitting this very issue to the jury. That it did not do so, we respectfully submit, requires a reversal of the judgment.

IX.

The District Court Erred in Sustaining the Demurrer to the Plea in Abatement and in Holding That the Appellant Was Not Immune When He Appeared Before the Commission in Response to a Subpoena and Testified as a Witness on Behalf of the Government With Reference to the "Matter of Consolidated Mines of California."

Section 22(c) of the Securities Act of 1933 as amended, 15 U. S. C. A. Sec. 77v(c), provides as follows:

> "No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury in so testifying."

The appellant was called to testify as a witness in the matter of the affairs of the corporation. Under the act he could not refuse to attend or refuse to testify. He did so testify regarding all matters and things about which he was asked. The company produced, under the com-

pulsion of a subpoena, the books and records of the corporation under a Commission order appellant testified with relation to all the matters and things about which he was asked with relation to Consolidated Mines. The giving of this testimony granted him immunity.

Counselman v. Hitchcock, 142 U. S. 547;

Brown v. Walker, 161 U. S. 819, 40 L. Ed. 819;

United States v. Goldman, 28 Fed. (2d) 424;

United States v. Armour & Co., 142 Fed. Rep. 808;

Hale v. Henkel, 26 Sup. Ct. 370;

In re Critchlow, 11 Cal. (2d) 751;

Ex parte Cohen, 104 Cal. 524;

Ex parte Clark, 103 Cal. 352;

In re Williams, 127 Cal. App. 424;

People v. Schwartz, 78 Cal. App. 561;

State v. Quarles, 13 Ark. 307, quoted in 142 U. S. 567, 12 Sup. Ct. 199, 35 L. Ed. 1110;

People v. Sharp, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851;

People v. Butler, 201 Ill. 236, 248, 66 N. E. 349;

In so far as the Securities and Exchange Act attempts to require a person to claim his privilege after he is called and required to testify, it is unconstitutional and in violation of the Fifth Amendment to the Constitution of the United States, because the immunity must be as broad as the constitutional guaranty.

Counselman v. Hitchcock, 142 U. S. 547;

In *United States v. Goldman,* 28 Fed. (2d) 424, at 434, 435, the Court said:

"We come, then, to the last objection urged against the pleas in bar. These defendants, it is asserted by the government, waived their immunity by failing, before the grand jury, to claim their constitutional privileges and refuse to testify. I am unable to see just why a person should be expected to claim a privilege which the law bestows upon him. There is nothing in the language of section 30 which justifies this claim. Nor do I think that the law stakes the liberty of the citizen upon the due performance of some piece of ceremonial mummery. Just how should these two defendants have made their claim? By refusing to obey the mandate of the subpoena? Such refusal would subject them to fine and imprisonment. By refusing to testify once they were within the grand jury room. Such refusal might conceivably lead to an instruction from the court that they would be immune from prosecution. But that is what the statute had already provided, and so they would need no such assurance. On what ground then, could they refuse to testify? None is suggested. And, if the law says that they may not refuse, are we to understand that that same law required that they should refuse?

"It is indeed true that upon this subject also there is a conflict of opinion. In the case of United States v. Skinner (D. C.), 218 F. 870, Judge Grubb of Georgia, sitting in the Southern district of New York, wrote an elaborate opinion in support of the thesis that, even under such a statute, the right to refuse to testify must be asserted before immunity follows. The argument would have been more convincing if the learned judge had pointed out upon

what principle a non-existent right can ever be asserted. But in United States v. Pardue (D. C.), 294 F. 543, Judge Hutcheson vigorously expressed his dissent from Judge Grubb's conclusion, and on page 546 said:

"'Judge Grubb, in the Skinner Case, stands alone in the position which he there takes. While his opinion presents a splendid argument against the wisdom of the immunity statutes as they now are, and a good suggestion to the legislative authorities for an amendment of them, it presents, in my opinion, no judicial ground for refusing to apply the statute as written. It by judicial interpretation writes into a statute in derogation of a constitutional right a limitation not therein contained, and which the ordinary mind, to which the statute is addressed, could not have supposed was contained in it. It to an extent follows the Draconian principle of writing the law in characters so fine that no one can read it, and thereby putting the government in a better position to take the unwary ones into its net. It magnifies the fault of the defendant, while it minimizes the bad faith of the government. It puts the seal of condemnation upon the offense against the general laws of which the defendant is charged, but it approves double dealing and evasion on the part of the government in the matter of a man's constitutional protection, which right reason and sound discrimination cannot, in my opinion, sustain."

Judge A. N. Hand, in the case of United States v. Lay Fish Co. (D. C.), 13 F. (2d) 136, expressed himself as in accord with Judge Grubb in the Skinner Case; but in United States v. Moore, *supra*, Judge Bean held that, under section 30, title 2, of the National Prohibition Act, immunity of witnesses tes-

tifying before the grand jury is not waived by their failure to claim the privilege and refused to testify, and on page 594 of 15 F. (2d) said:

" 'There are, I know, some decisions of District Courts to the contrary; but, in view of the construction given the statute by the Supreme Court, it seems to me clear that the court is forced to the conclusion that the pleas in bar are good. It is said that defendants are not entitled to immunity, because they did not, when called as witnesses, claim their privilege and refuse to testify. That would have been a useless act on their part, because they were compelled to testify whether they wanted to or not. Such was the ruling in the Brown Case. It cannot be said that they waived their privilege when they appeared in obedience to subpoena and testified for the government. They had no alternative but to comply with the subpoena. Having done so, the government is not in position now to charge Moore or Robinson with a conspiracy to violate the Prohibition Act.'

"Such was the conclusion of Judge Neterer in United States v. Ward (D. C.), 295 F. 576. Indeed the Moore Case is the only one which deals specifically with section 30, title 2, of the National Prohibition Act. A well-reasoned and persuasive opinion by the New York Court of Appeals in construing a similar statute will be found in People v. Sharp, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 821, and, indeed, in none of the cases above cited will there be found an attempt to meet the powerful presentation by Judge Danforth in the Sharp Case. Had there been any doubt in my own mind, I would have found it impossible to resist the logic of that opinion as found on page 443 *et seq.* of 107 N. Y. (14 N. E. 319)."

The District Court erred in denying to the appellant a trial by jury on the issue of whether he was entitled to immunity. The Court in its opinion stated that the defendant took the stand and gave testimony after he was informed concerning his constitutional privilege against self-incrimination. The Court said:

> "These facts are not denied. If they were, an issue of fact might be created as to which the defendant would be entitled to a jury trial. Jones v. United States, 9th Circuit (1910), 179 F. 584.

There is no need for this."

However, there was an issue of fact raised as to whether, under the circumstances of the case, even though Shaw appeared before the committee and testified, he did so voluntarily or under the compulsion of a request made to him to appear, and what the intent of the parties was.

In the case of *Counselman v. Hitchcock,* 142 U. S. 547, 35 L. Ed. 1110, it was said that no statute which leaves the party, or witness, subject to prosecution after he answers the incriminating questions, can have the effect of supplanting the privilege of the Fifth Amendment; that to be valid the immunity must be *absolute* against any future prosecution for the offense to which the question relates, and that a statute merely prohibiting the introduction in evidence, for the use in any manner or discovery or evidence obtained from a party or witness affords no protection against that use of compelled testimony which consists of gaining therefrom a knowledge of the details of the crime, and of the sources of information which may supply other means of convicting the

witness or party. The Court holds that the statute must be as broad as the constitutional guaranty. It said:

> "We are clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the incriminating questions put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the revised statute does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the questions relate."

The instant act, therefore, is *conditional* and not absolute. The condition is that the witness must claim the privilege, and unless he does so the statute is not effective.

If the statute is valid there is no privilege to claim. The mere testifying itself grants the immunity under the statute. The interpretation of immunity has been before the United States Supreme Court on several occasions, and each and all of them have sustained the leading case of *Counselman v. Hitchcock,* 142 U. S. 547, 35 L. Ed. 1110. They have been repeatedly unheld. (See *Interstate Commerce Comm. v. Baird,* 48 L. Ed. 860; *Arndstein v. McCarthy,* 65 L. Ed. 138; *United States v. Goldman,* 28 F. (2d) 424.)

A statute must grant absolute and unconditional immunity. (*In re O'Shea,* 166 F. 180.)

Any statute which merely grants conditional immunity, such as this statute, is a delusion and a snare, and places

conditions beyond the Fifth Amendment to the Constitution of the United States.

The *Counselman* case holds, and the constitutional guaranty provides, that a person may not even be called and compelled to be a witness against himself. The statute in question provides that the witness must appear and testify. The *Counselman* case holds that any statute which so provides must grant absolute immunity. The condition to claim the privilege destroys the constitutional validity of the statute.

As said in *Olmstead v. United States,* 277 U. S. 944, 72 L. Ed. 438, 473:

> "When the 4th and 5th Amendments were adopted, 'the form that evil had theretofore taken' had been necessarily simple. Force and violence were then the only means known to man by which a government could directly effect self-incrimination. It could compel the individual to testify—a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incident to his private life—a seizure effected, if need be, by breaking and entry. Protection against such invasion of 'the sanctities of a man's home and the privacies of life' was provided in the 4th and 5th Amendments, by specific language. Boyd v. United States, 116 U. S. 616, 630, 29 L. ed. 746, 751, 6 Sup. Ct. Rep. 524. But 'time works changes, brings into existence new conditions and purposes.' Subtler and more far-reaching means of inviding privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet."

In *Entick v. Carrington,* 19 How. St. Tr. 1030, it is said:

"The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case there before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence of a crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the 4th and 5th Amendments run almost into each other."

Mr. Justice Fields in *In re Pacific Railroad Comm.*, 32 F. 241, 250, said:

"Of all the rights of the citizen few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers, from the inspection and scrutiny of others. Without the enjoyment of this right all others would lose half their value."

X.

Appellant Entitled to Trial by Jury on Issue of Facts.

The demurrer to the plea in abatement should have been overruled and the case set down for trial. The plea in abatement pointed out that the Securities and Exchange Commission appointed Milton V. Freeman examiner, to require and compel the production of books, papers, contracts, agreements and other documents before the said Commission at their hearing. It further pointed out that the appellant was requested to appear at such hearing as a witness on behalf of the Government concerning the affairs and conduct then under investigation by the Commission of the Consolidated Mines of California, a corporation. That corporation, which was then under investigation, did not appear because no subpoena had been issued against them, and when a subpoena was issued against them, the corporation failed to produce its books until ordered and compelled to do so by an order of the Court. It was duly appealed to the Ninth Circuit Court of Appeals, which affirmed the order of the District Court. The appellant was neither an officer nor an employee of the company, but the Government subpoenaed him as the Government's witness [R. 72].

The statute says that "no person shall be excused from attending and testifying." The statute shows that he could be brought to the hearing by some other method than by a subpoena, and the record shows that he was requested to appear. This shows in the affidavit of Milton V. Freeman. It certainly would be an odd situation if one who appears at the request of an officer not to be immune unless he disobeys the request of the officer and fails to appear when requested to do so. Having appeared and testified

pursuant to that request he was granted immunity under the statute.

But the Government in its demurrer to the plea in abatement and its motion to strike the plea, stated that the plea in abatement did not set up facts sufficient to show that the defendant was compelled to testify or produce evidence, documentary or otherwise, concerning any transaction, matter or thing, which is the basis of this indictment or otherwise.

In support thereof was the affidavit of Milton V. Freeman, the examiner, which in itself showed that appellant Shaw fully testified regarding the matters for which he was subsequently prosecuted. This affidavit showed that the examiner thought he was not granting immunity to the petitioner by reason of this testimony. However, it was not for the examiner to decide whether immunity was granted or not under the factual situation that was raised by this case, nor in fact was it the duty of the trial judge to decide it by sustaining the demurrer to the plea in abatement. It raised an issue of fact which should have required the trial court to overrule this demurrer and set the matter down for trial, requiring the Government to answer and join an issue of fact.

In *Sherwin v. United States,* 268 U. S. 368, 69 L. Ed. 1001, Sherwin and Schwarz filed a plea in bar of immunity under section 9 of the Federal Trade Commission Act on the ground that information which they gave resulted in their subsequent prosecution. In that case there was a replication; issue was joined; a trial was had upon the plea, and under instructions of the Court *the jury* found against the defendants upon their plea of immunity.

It is respectfully submitted that the same procedure ought to have been followed here in so far as the Court

overruling the demurrer and the motion to strike the plea. In respect to the granting of the motion to strike the plea in abatement the trial court erred.

The trial court says in its opinion:

> "He took the stand and gave testimony. These facts are not denied. If they were, an issue of fact might be created as to which the defendant would be entitled to a jury trial. Jones v. United States, 9 Cir., 1910, 179 F. 584. There is no need for this." [R. 100.]

The trial court overlooks the fact in its opinion that prior to giving his testimony the officers of the corporation had been compelled, not only by subpoena but by District Court and Circuit Court order, to produce the books and records of the corporation, and also that the appellant was requested to appear, and he did appear, in response to the examiner's request. Under the terms of the statute, this appearance at the request of the examiner was compulsory. The examiner was duly authorized to require the appearance of the petitioner and was regularly appointed for that purpose. His request was a mandate of law, just as much as is the request of a police officer to a man to accompany him to the jail. It may be that the man won't run away and won't refuse to come along; but the request is mandatory and compulsory. We know by the language of the section itself that "no person shall be excused from attending and testifying *or* from producing books," etc., *or* "in obedience to the subpoena of the Commission, or any member thereof or any officer designated by it, on the ground that the testimony or evidence, documentary or otherwise, required of him, may intend to incriminate him or subject him to a penalty or forfeiture; . . ."

It will be noted that the section requires and states that no person shall be excused "from attending and from testifying." If the official designated as the proper officer for the Commission says "come to my office and testify," the witness so called has no other alternative.

The question then arises as to what was the intent of the Commission in calling Shaw, and what was the intent of Shaw when he testified. He was entitled to a determination of these facts by a jury.

This very issue is raised by the affidavit of Milton V. Freeman which says, "Affiant did not intend to grant said defendant Shaw immunity from prosecution. Affiant did not then believe and does not believe that immunity from prosecution was granted to the defendant."

If Freeman did not intend to grant immunity appellant was entitled to a trial by jury on that intent, as the plea in abatement set up the allegation that the appellant was called as a witness *on behalf of the Government* concerning the affairs and conduct then under investigation by the Commission of the Consolidated Mines of California, a corporation.

It was equally important both from the standpoint of the Government and from the standpoint of the defense to determine the understanding and belief under which the witness testified. Furthermore, the statement of the examiner to Shaw that "At this time I must advise you that you may refuse to answer any question that I may ask you if the answer may tend to incriminate you or subject you to any penalty or forfeiture" was not followed by any request by the said examiner to Shaw asking Shaw whether he waived his privilege, and the record shows that there was no waiver of privilege.

In criminal cases an express waiver is needed. (*Jones v. United States* (9th Cir.), 179 F. 584; *Stanton v. United States,* 281 U. S. 276; *Irvin v. Zerbst,* 97 F. (2d) 257; *Spann v. Zerbst,* 99 F. (2d) 336.)

The jury was also entitled to have passed upon the matter as to whether there was any express waiver. There being none, the immunity of the statute flowed. The last statement is based upon the premise that there was a privilege to waive, which is not conceded.

For under the case of *Counselman v. Hitchcock,* quoted above, the mere compliance with the statute when one is requested to testify is sufficient to grant statutory immunity and there is no privilege to waive.

Conclusion.

It is respectfully submitted that under the objects and purposes of this act and the exemptions which the Congress of the United States has applied to it, that no offense against the laws of the United States was committed by the appellant; that he is exempt from the purposes and scope of the act and its declared provisions, and that the Court erred in its instructions to the jury with reference to personally owned stock, which is exempt under the law of this case and under the act; that the Court further erred in depriving the appellant of a trial by jury on his plea in abatement and in granting the motion to strike the plea.

As stated in the memorandum of the Securities and Exchange Commission to the United States Supreme Court:

> "The fundamental purpose of the Securities Act of 1933 . . . is to protect the investing public. The act furnishes one form of protection by insisting that

> 'every issue of new securities to be sold in interstate commerce shall be accompanied by full publicity and information' to the end that 'no essentially important element attending the issue shall be concealed from the buying public.' Message of the President to the Congress, March 29, 1933." (Footnote, 85 L. Ed. 505.)

The Consolidated Mines of California appeared three times before the Corporation Commissioner of California. Its acts were accompanied by full publicity and information, and nothing was concealed from the public. The particular stocks involved in counts 14, 15 and 16 were not a new security, nor were they sold in interstate commerce, but were sent from one address to another address in the County of Los Angeles. The appellant was neither an officer, a director nor an employee of the company. He did not cause the stock to be mailed. The persons who received the stocks had no complaint about its fairness, nor did they complain that there had been any concealment or that there had not been a full and fair disclosure of the same.

Yet the appellant faces six months in jail.

It is respectfully submitted that the judgments should be reversed.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Appellant.